Theories of Harm on Abuse of Dominance

A Sino-EU comparative analysis of the impact of institutional dynamics on the law enforcement

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献给我的父母

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INTRODUCTION

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1 Background

After more than a decade of drafting, the Anti-Monopoly Law ("AML") of China was adopted on August 30, 2007, and entered into force on August 1, 2008.[1] The law has captured worldwide attention from the outset, because of China's booming economy, deep involvement in international trade and investment, and the commitment to establishing a (vaguely defined) socialist market economy.[2] By taking a look at the AML, one could quickly notice two features of the legal framework.

First, in terms of the substantive law, it can be observed that the AML drew considerable inspirations from EU competition law.[3] That is also the case regarding the enforcement, as the Chinese enforcers have been keeping a close eye on EU competition law developments, and have been continuously drawing inspirations therefrom.[4]

Secondly, in terms of the institutional structure, the AML initially adopted a "dual-track and tripartite system" for the law enforcement. The institutional structure of the AML is idiosyncratic in two aspects:

- First, it is a dual-track system incorporating two ways of enforcement: public enforcement through the designated administrative agencies, and private enforcement through civil litigations before the competent courts.[5] This dual-track setting can be commonly found in competition law regimes around the world, but what is uncommon about the AML is that the public enforcement activities by the

1 The Anti-Monopoly Law of the People's Republic of China (《中华人民共和国反垄断法》), adopted by the Standing Committee of the National People's Congress on August 30, 2007, effective on August 1, 2008, http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml (accessed November 5, 2018) (hereinafter, "the AML").

2 H. Stephen Harris, *Anti-Monopoly Law and Practice in China* (New York: Oxford University Press, 2011), 8. See also H. Stephen Jr. Harris, "The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China Symposium: Legal Implications of a Rising China," *Chicago Journal of International Law* 7, no. 1 (2006): 176–77, 185.

3 For a comparative analysis of the substantive provisions in the AML with the relevant EU rules, see Giacomo Di Federico, "The New Anti-Monopoly Law in China from a European Perspective," *World Competition* 32, no. 2 (2009): 252–63 (finding a high level of consistency of the AML text regarding the three pillars of competition law with the relevant EU competition rules). See also, Haixiao Gu and Andrew L. Foster, "Substantive Analysis in China's Horizontal Merger Control: A Six-Year Review and beyond," *Journal of Antitrust Enforcement* 3, no. suppl_1 (2015): i27, doi:10.1093/jaenfo/jnv019 ("China founded its merger control regime to a large extent on concepts and methods developed by more mature antitrust jurisdictions, especially the European Union (EU) and, to a lesser degree, the USA."); Xiaoye Wang, "Highlights of China's New Anti-Monopoly Law," *Antitrust Law Journal* 75, no. 1 (2008): 134 (pointing out that the AML "also absorbed experiences from Europe, for instance the block exemptions for certain agreements, the factors considered for determination of the existence of dominant market position, and the rebuttable presumptions of dominant position").

4 Yichen Yang, "Price-Related Cartels under the Chinese Anti-Monopoly Law Regime: The Need to Clarify Four Substantive and Procedural Issues," *World Competition* 39, no. 3 (2016): 497 (observing the EU influence in the NDRC's analytical framework for horizontal price-fixing agreements).

5 Article 50 of the AML (see note 1).

agencies are subject to practically no judicial review.[6] This creates an unsettling discrepancy between the law "in the books" and the law "in action". According to the law "in the books", the enforcement decisions of the administrative agencies are perfectly reviewable under the Chinese Administrative Litigation Law adopted in 1989, but in the reality of the Chinese political and legal system, subjecting administrative powers to judicial constraints has always been a sensitive matter,[7] and the AML enforcement is no exception. In that event, the Chinese judiciary's role in the AML enterprise is to a large extent limited to adjudicating private enforcement cases. Against the "dual-track" backdrop and functionally speaking, this makes the courts to a certain extent the "competitors for enforcement" of the administrative agencies.

- Secondly, pertaining to the public enforcement sphere, the institutional structure was tripartite. Namely, the public enforcement responsibilities were split three ways to three central administrative agencies: the National Development and Reform Commission ("NDRC"), the State Administration for Industry and Commerce ("SAIC"), and the Ministry of Commerce ("MOFCOM").[8] Notably, this tripartite design has been abandoned after almost a decade of operation, as in March 2018 the State Council decided to consolidate the three AML enforcement agencies into one.[9]

These two aspects of idiosyncrasy make the institutional structure of the AML stand in contrast with that of EU competition law, in which the European Commission ("the Commission") assumes a central role in the Union-wide enforcement network and is subject to the judicial supervision of the Court of Justice of the European Union ("the CJEU").[10] At the Union level, the Commission does not share the public enforcement responsibilities with any other institutions, and the CJEU's judicial supervision on the Commission is very much

6 Angela Huyue Zhang, "Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope," *Stanford Journal of International Law* 51 (2015): 211–12 ("Since the enactment of the AML in 2008, there has been only one unsuccessful appeal lodged against a local enforcement agency in Jiangsu and no appeal has been lodged against any central enforcement agency."). For more discussions on this point, see Section 3.1.3 of Chapter 4 of this dissertation.

7 Haibo He, "Litigations without a Ruling: The Predicament of Administrative Law in China," *Tsinghua China Law Review* 3 (2011): 262–66 (observing an "enormous gap between the law on paper and the law in reality" based on "national date on the acceptance and concluding of administrative cases in first instance").

8 Qian Hao, "The Multiple Hands: Institutional Dynamics of China's Competition Regime," in *China's Anti-Monopoly Law: The First Five Years*, ed. Adrian Emch and David Stallibrass (Alphen aan den Rijn: Wolters Kluwer International, 2013), 15–16, 19–21 (explaining the historical reasons for the come-into-being of the tripartite regime). See also, Angela Huyue Zhang, "The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective," *Antitrust Bulletin* 56, no 1 (2011): 635 ("the tripartite system seems to be a political compromise that reconfirms the division of labor under the previous competition law enforcement regime").

9 More descriptions about this consolidation can be found in Section 2.1.2 of Chapter 4 of this dissertation.

10 Loannis Lianos and Arianna Andreangeli, "The European Union," in *The Design of Competition Law Institutions: Global Norms, Local Choices*, ed. Eleanor M Fox and Michael J Trebilcock (Oxford: Oxford University Press, 2012), 390–91, doi:10.1093/acprof:oso/9780199670048.003.0009.

present;[11] meanwhile, the CJEU assumes two responsibilities: adjudicating cases that seek to annul Commission enforcement decisions, and answering preliminary references that contain questions submitted by courts of the Member States concerning the application of EU law.

Therefore, even with the tripartite regime already being consolidated, a key difference still exists between the institutional structures of the two jurisdictions: the presence of judicial supervision on public enforcement or the lack thereof. This entails two contrasting modes of institutional function-allocation—and thus two contrasting sets of institutional dynamics—between the administration and the judiciary: in the EU competition law context, the judiciary is the supervisor of the administration, whereas in the Chinese AML context, the judiciary is a virtual "competitor" of the administration for enforcement.

This raises concerns in light of the "principal-agent" relationship. Supposedly, the enforcement agencies carry out their responsibilities under the delegation of their principal, namely the legislators. To prevent the delegated agents from disobedience, the principal needs monitoring and control. There are three mechanisms available for such control: (political) hierarchical control, obedience-internalization with the agent, and third-party (judicial) supervision.[12] Accordingly, two questions arise:

(1) How are the AML enforcement agencies being controlled, if not through judicial supervision?
(2) How are the courts being controlled, if they were the functional equivalent of the enforcement agencies?

In light of the above, one would find the unique institutional structure of the AML worth studying, particularly regarding its impact on the enforcement outcomes. For example, there could be a positive prospect of mutual supplementation and enhancement between the agencies and the courts when it comes to tackling the anticompetitive practices that are prevalent in the Chinese economy,[13] but at the same time there could also be a danger of inconsistent and distorted enforcement, as the decision-making of the administrative agencies is subject to no judicial vetting and the courts handle AML cases only on a reactive

11 Ibid., 399–402.

12 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (Cambridge: Cambridge University Press, 2008), 61–62.

13 Xiaoye Wang and Adrian Emch, "Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges," *Journal of Antitrust Enforcement* 1, no. 2 (2013): 263, doi:10.1093/jaenfo/jnt010 ("In that way, there is competition in antitrust enforcement, which not only helps increasing the profile of the AML, but private litigation can also alleviate the human resource shortage in the administrative authorities.").

and contingent basis.[14] The AML institutional structure is also worth comparing with the EU counterpart, for the benefit of mutual developments and the appeal of global competition law convergence.[15]

Such a study is also practically possible, because after approximately a decade of enforcement, there have been a considerable number of AML cases. These cases can be used as samples for analyzing how the structurally enabled "institutional competition" dynamics have shaped the substantive enforcement outcomes. To further that analysis, a comparison could be drawn with the EU competition law regime, after a counterpart analysis as to how the "supervisor-supervisee" dynamics shape the substantive enforcement outcomes. With the abundance of EU case precedents, that counterpart analysis would also be possible. This dissertation limits the scope of such substantive enforcement outcomes to the theories of harm in the enforcement decisions, which demonstrate the anticompetitiveness of the prosecuted practices in individual cases.

2 Research Questions

The central research questions can be posed as the following:

- Are theories of harm produced differently by the functionally different institutions in a regime of law on abuse of dominance?
- If yes, how are they different?

The two research questions are accompanied by the following hypotheses:

- *The jurisprudence and rationales underlying the law enforcement on abuse of dominance are applicable across jurisdictions*. This dissertation admits that each legal regime on abuse of dominance has its individuality, particularly in terms of the overarching legal objectives. However, whatever unique objectives and special

14 Qian Hao, "An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution," in *Procedural Rights in Competition Law in the EU and China*, ed. Caroline Cauffman and Qian Hao (Berlin, Heidelberg: Springer Berlin Heidelberg, 2016), 57, https://doi.org/10.1007/978-3-662-48735-8_3 (noting the danger of inconsistencies in the AML enforcement caused by the interference of other policies that these agencies are in charge of and the interference from other government players). See also Zhang, "Taming the Chinese Leviathan," 212–15 (suggesting that the AML enforcement outcome is likely to be either delayed or selective, because the demand of regulation exceeds the supply of regulation); Wendy Ng, "The Independence of Chinese Competition Agencies and the Impact on Competition Enforcement in China," *Journal of Antitrust Enforcement* 4, no. 1 (2016): 199–206, doi:10.1093/jaenfo/jnv032 (demonstrating how the multiplicity of responsibilities and the consultations with other agencies have impacted the enforcement outcomes of the NDRC and the MOFCOM).

15 Glenn Morgan et al., "Introduction," in *The Oxford Handbook of Comparative Institutional Analysis*, ed. Glenn Morgan et al., Oxford Handbooks (Oxford: Oxford University Press, 2010), 4 (suggesting that, because of the universality of competition law, "the public policy arena is full of comparison between countries"); Eleanor Fox, John Fingleton, and Sophie Mitchell, "The Past and Future of International Antitrust: Gaps, Overlaps and the Institutional Challenge," in *Building New Competition Law Regimes*, ed. David Lewis (Edward Elgar Publishing, 2013), 178–80 (identifying several problematic aspects that are in need of global convergence of competition law).

rules a regime may have, the fact remains that its operationalization is dependent on certain basic conceptions of the anticompetitiveness of abusive conduct. In that sense, a common basis exists for comparing the EU regime and the Chinese regime.

- *A theory of harm is identifiable in every enforcement decision* (by an administrative agency or by a court) of the law on abuse of dominance. Such a theory of harm could be elaborate or concise, and its substance could be convincing or disputable, but supposedly it is always present. To identify a theory of harm, one could start with locating the allegations of competitive harm of a practice, and proceed with summarizing the decision-maker's reasoning on how that harm came about.
- *The production of theories of harm can serve as a parameter for evaluating the performance of the enforcement bodies*. A high-quality enforcement decision, in terms of its substantive analysis, is expected to be logically coherent and in conformity with general economic principles and theories. This is how the identification of theories of harm could be related to the enforcer performance-evaluation: by describing the theory of harm of an enforcement decision and examining its internal consistency of logic and the degree to which it makes economic sense, one could appraise the quality of the substantive analysis in that case decision, which partly reflects the enforcer's performance. On that basis, one could further analyze whether and how the underlying institutional structure and dynamics affect the enforcer performance.

The following sub-questions can be developed:

- What are the institutional structures (and the ensued dynamics) of the EU and Chinese laws on abuse of dominance? And how are they different from each other?
- What are the theories of harm that can be identified and categorized based on the enforcement records from the EU and Chinese regimes?
- In each of these two regimes, whether there are any differences between the theories of harm produced by the agencies and those by the courts?
- If the answer to the preceding question were yes, how could the structurally induced institutional dynamics account for such differences? What are the implications of such accounts?

3 Methodologies

The methodologies employed in this dissertation can be explained from the following aspects. First, this dissertation follows to a large extent the so-called doctrinal approach,[16]

16 Michael McConville and Wing Hong Chui, "Introduction and Overview," in *Research Methods for Law*, ed. Michael McConville and Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007), 4 (describing the doctrinal research approach as the use of "interpretative tools or legal reasoning to evaluate legal rules and suggest recommendations for further development of the law").

in the sense that it focuses on analyzing the content of case law. Such analyses look closely at the internal logic of the case decisions and judgments from the two legal regimes, in an effort to critically describe the production of theories of harm therein.[17] The doctrinal approach is also employed in this dissertation's descriptions of the legal frameworks and the institutional structures of the two regimes, as these descriptions introduce what the laws are from a normative perspective.[18]

Secondly, this dissertation also has several non-doctrinal aspects, where the methodology that could be characterized as "literature review" is employed:

- By highlighting the idiosyncratic institutional structure of the Chinese AML regime and by asking (with the EU regime as a comparative parameter) the question of how the structurally induced institutional dynamics influence the theory of harm production, this research is problem-based and thus qualitative.[19] The methodology of literature review is employed for this problem-based aspect of research.[20]
- This dissertation relies on an external (legal literature) perspective to select and to categorize the cases for the doctrinal analyses. It takes into account existing legal literature when selecting the case samples, and present these cases according to the types of conduct involved. The categorization of conduct is borrowed from widely agreed abuse-categorizations in existing legal literature (particularly the studies concerning EU case law on abuse of dominance). The case selection criteria are more thoroughly described in Chapters 5 and 6 before the respective case analyses.
- Regarding the conception of theory of harm, this dissertation relies on the premise that economic theories underpin the idea of "competitive harm". This premise is presented in Section 1 of Chapter 2. Accordingly, this dissertation adopts the thinking that economic theories influence the law enforcement at a foundational level, and that qualitative economic theories could be used as a yardstick to appraise the enforcement outcomes. In that sense, this dissertation adopts the methodology of literature review to introduce the appraisal perspective of qualitative economics.

Thirdly, this dissertation adopts a comparative approach, as it compares the case analyses regarding two regimes—the EU and Chinese legal regimes on abuse of dominance. The purpose is two-fold: (1) using the EU regime as a benchmark for appraising the impact

17 Ian Dobinson and Francis Johns, "Legal Research as Qualitative Research," in McConville and Chui, *Research Methods for Law*, 25–26 (describing the methodology of doctrinal legal research as a seven-step "literature review" in a social science context).

18 Ibid., 20–21 (defining doctrinal or theoretical legal research in simple terms as "research which asks what the law is in a particular area").

19 Ibid., 22, 42 (distinguishing four categories of legal research: doctrinal, problem, policy, and law reform-based research, and defining the latter three as qualitative research).

20 Ibid., 25–26.

of the Chinese AML institutional structure on the production of theories of harm, and (2) drawing lessons from the EU regime analyses for the Chinese regime and vice versa. To that end, the methodology of functional comparison is employed. The main aspects of this functional comparison can be described as follows:

- Pursuant to functionalism's (especially epistemological functionalism's) focus on the interrelations of elements (instead of the nature of each element),[21] this research focuses on the relationship between "the structurally induced institutional dynamics" and "the production of theories of harm", and compares the EU and Chinese regimes for their differences pertaining to that relationship.[22]
- The comparison aims at generating new legal insights. This is possible, because competition law enforcement could be seen as a process of experimentation, in the sense that we have no perfect knowledge to solve all anticompetitive problems and thus a useful way to improve the enforcement is to reflect upon the past and draw lessons from others.[23]

4 Structure

This dissertation consists of seven chapters.

Chapter 1 is the introduction. Chapter 2 establishes the theoretical framework. It first discusses the concept of theory of harm pertaining to its narrating function and some key characteristics. It also discusses the foundational role of economic theories for the production of theories of harm, using the EU regime as an example. Subsequently, this chapter discusses in a theoretical context the institutional structure and dynamics underlying the law enforcement on abuse of dominance. It does so by reviewing the literature on antitrust institutional studies, a major part of which use the US antitrust regime as the subject. The research findings of those studies are nonetheless not limited to the US regime; they provide potentially valuable insights for this research. A basic distinction is made between two sets of institutions: the administrative agencies and the courts. This chapter looks at them in sequence, and accentuates two issues: agency discretionary power and judicial deference.

Chapter 3 first introduces the EU legal framework on abuse of dominance, including the Treaty provisions, the secondary legislation, the soft law, and the CJEU case law. It then introduces the EU regime's institutional structure at the supranational level.

21 Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 355.

22 For a benchmarking model for comparing the institutional designs of regimes, see William E. Kovacic and David A. Hyman, "Competition Agency Design: What's on the Menu?," *European Competition Journal* 8, no. 3 (2012): 529–36.

23 William E. Kovacic, "Achieving Better Practices in the Design of Competition Policy Institutions," *Antitrust Bulletin* 50, no. 3 (2005): 516.

Similarly structured, Chapter 4 introduces the legal framework and institutional structure of the Chinese AML. It gives particular attention to the roles played by the three public enforcement agencies in the AML legislative process and their delimitation of jurisdiction after the AML was adopted; the purpose is to explain how the idiosyncratic institutional structure came into being.

Chapter 5 looks at the production of theories of harm in the EU regime. It first describes the market integration mandate, which is the other cornerstone of the EU law on abuse of dominance, along with the economic theories introduced in Chapter 2. It then selects a number of cases, consisting of annulment cases and preliminary ruling cases. These cases pertain to various types of abusive conduct. This chapter analyzes the theories of harm produced by the institutional actors involved in these cases. Summarizing observations are presented after the analyses.

Chapter 6 turns to the production of theories of harm by the AML enforcers. According to the criteria mentioned in the Methodology section of this chapter, it selects a number of cases on abuse of dominance (and additionally on resale price maintenance) by the enforcement agencies and the courts. These cases are presented according to the types of allegedly anticompetitive conduct they include. The theories of harm in these cases are analyzed accordingly. Summarizing observations are presented after the analyses.

Chapter 7 includes five parts. The first part summarizes and compares the institutional structures of the EU competition law and the Chinese AML. The second part summarizes the findings made in Chapters 5 and 6 concerning the respective theory-of-harm production in the two regimes. The third part discusses how the differences between the theory of harm production of the two regimes could be attributed to the different institutional structures and the ensued implications. Based on these three parts, the fourth part provides summary answers to the research questions. The fifth part points out two directions for further research.

Notably, Chapters 4, 5, and 6 contain contents that were also addressed in previous publications by the author. In that regard, references to those publications are provided and direct or indirect repetition is omitted.

5 Limitations

This dissertation has several limitations. First, regarding the substantive scope, it is limited to the law on abuse of dominance. "Abuse of dominance" is a segment of competition law where the open texture and wording of the law necessitates greater conceptual clarity in the application and thus more elaborate and more clearly defined theories of harm. Other segments of competition law (such as anticompetitive agreements regulation and merger control) are equally worthy of discussion. They are saved for further research.

The second limitation is that, by focusing on the link between institutional structures and the production of theories of harm, this dissertation refrains from scrutinizing the more fundamental impact factors such as economic theories and policy considerations. Thoroughly discussing those factors would be too extensive for the scope of this research. Moreover, this dissertation discusses only the impact of institutional dynamics on the jurisprudence in substantive decision-making, while fully aware that institutional influences extend far beyond this issue. Lastly, this dissertation makes an effort to construct the concept of theory of harm, but this construction is not in any way complete; it is open for discussions and criticisms.

Thirdly, pertaining to the Chinese part of this dissertation, the case samples are comprised of the existing and online-available enforcement decisions and judgments. They are analyzed mainly from a doctrinal perspective: their theories of harm are critically described in terms of (1) their internal consistency of logic, and (2) the extent to which they are compatible with established economic theories. On that account, this dissertation fully acknowledges but does not focus on a more imminent issue in the Chinese AML regime: inadequate enforcement. Addressing that issue would require more than just legal doctrinal analyses of the existing case records. This would be beyond the scope of this dissertation, and thus is saved for further research.

6 A Clarification on the Terminology

Before moving on to subsequent chapters, it is necessary to clarify the use of three expressions in this dissertation: "competition law", "antitrust law", and "anti-monopoly law".

To a certain extent, these three expressions are just contextually different terms referring to the same substance. The expression of "competition law" is predominantly used in the EU context, referring to the overall enterprise of EU competition law and also to the equivalent enterprises of other jurisdictions when compared to the EU. Meanwhile, the expression of "antitrust law" is commonly adopted in the US context. Accordingly, the equivalent enterprises of other jurisdiction could be referred to as antitrust laws when compared to the US. Lastly, the expression of "anti-monopoly law" is used (at least in this dissertation) within the Chinese context, referring to the Anti-Monopoly Law.

Nonetheless, there are some notable nuances regarding the concurrent adoptions of the first two expressions in the EU context. Namely, the Commission uses the term "antitrust rules" to refer to Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), so as to conceptually distinguish the legal segments governed by these two Articles from the other segments of EU competition law. There is a practical need to do so, for example when addressing issues concerning private enforcement under these two Articles. This is exemplified in the Commission's preparatory work for a Directive governing

the actions for damages.[24] Another exemplification is the headings of the internal units of DG Comp of the Commission. However, it seems that the Commission and the EU legislature prefer to use the expression of "antitrust" only in a strictly non-legal context, as that expression is nowhere to be found in the 2014 Directive on antitrust damage actions.[25]

Since this dissertation focuses on studying the EU regime and the Chinese regime, it uses the expressions of "competition law" and "anti-monopoly law" within their respective context. The expression of "antitrust law" is used when the US regime enters the discussion. Such is the case in Chapter 2, where a number of scholarly works studying the US antitrust law regime are introduced.

24 The Commission consistently characterized Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 TFEU) as "antitrust rules" in its preparatory work for the Damages Directive. See Green Paper – Damages actions for breach of the EU antitrust rules, COM(2008) 165 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005DC0672 (accessed November 6, 2018), 3; White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf (accessed November 6, 2018), 2; Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF (accessed November 6, 2018), 3, 11.

25 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [December 5, 2014] OJ L 349, 1–19.

THEORETICAL FRAMEWORK: THE CONCEPT OF "THEORY OF HARM" AND THE "AGENCY-COURT" DYNAMICS

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1 The Concept of Theory of Harm

1.1 Competitive Harm as the Qualifier of Illegality

The law on abuse of dominance makes illegal certain *conduct* of dominant undertakings, as opposed to their dominant status. Following this jurisprudence, a question arises as to what makes a type of conduct condemnable. The law on abuse of dominance does not provide a clear-cut answer on that front. In other words, the law has an open texture, and thus its application requires the formulation of legal standards.[1] Such legal standards are to be applied after the decision-maker has made the relevant findings of fact based on the information collected and processed.[2]

Introducing the idea of "anticompetitiveness" is an initial step in that formulation. This idea could help distinguish conceptually what is condemnable and what is not, since the law on abuse of dominance pursues the direct objective of competition preservation (despite the varying goals of different competition law regimes at a more fundamental level).[3] In other words, such "anticompetitiveness" indicates the adverse impact of a unilateral practice by a dominant undertaking on competition, which the law is set out to preserve, and therefore enables that practice to be condemnable. Pursuant to the direct objective of competition preservation, the concept of "competitive harm" could also be introduced, as it offers a logical route for elaborating how a unilateral practice by a dominant undertaking could be anticompetitive and thus should be illegal under the formulated legal standards.

Two points are notable here. First, the concept of competitive harm may be comprehensible, but there is no consensus on what kind of substance that concept should be comprised of.[4] From a normative perspective, one could say that competitive harm is linked inherently to the enshrined objectives of each competition law regime and therefore its substance would vary according to the different legal contexts. As observed by the American Bar Association, "[T]he preservation of competition does not always mean the same thing in different jurisdictions and is sometimes only one of several objectives pursued under a country's

1 Einer Elhauge, "Defining Better Monopolization Standards," *Stanford Law Review* 56, no. 2 (2003): 255–56 (pointing out the importance of legal standards in antitrust decision-making). See also, Cyril Ritter, "Presumptions in EU Competition Law," *Journal of Antitrust Enforcement* 6, no. 2 (August 1, 2018): 191–93, https://doi.org/10.1093/jaenfo/jny008 (discussing the role of legal standards—in the form of legal presumptions—in EU competition law).

2 C. Frederick Beckner and Steven C. Salop, "Decision Theory and Antitrust Rules," *Antitrust Law Journal* 67, no. 1 (1999): 42–43 (highlighting the importance of information gathering as the basis for and a limitation to the formulation of substantive legal standards).

3 Maurice E. Stucke, "What Is Competition?," in *The Goals of Competition Law*, ed. Daniel Zimmer (Cheltenham: Edward Elgar, 2012), 29.

4 Anne C Witt, *The More Economic Approach to EU Antitrust Law*, Hart Studies in Competition Law, volume 14 (Oxford, United Kingdom: Hart Publishing, 2016), 110 (describing that although one gets "the general idea that the investigated conduct needs to harm competition, or at least be likely to do so", it is still questionable as to what is harm to competition).

antitrust laws".[5] Even if the preservation of competition were construed homogeneously across jurisdictions, the fact would probably remain that the law is unspecific as to what kind of legal interest is at stake for a particular type of conduct. Therefore, the anticompetitiveness (in other words, the competitive harm) of that type of conduct can accommodate a wide range of legal interests, as long as those legal interests do not explicitly contradict the goals laid down in the law. Such is the case in the EU regime on abuse of dominance: on some occasions, a type of conduct was deemed abusive for causing a single set of competitive harm—*competition foreclosure*; but on some other occasions, the abusiveness of the same type of conduct derives from multiple sets of competitive harm, which include but not limited to fairness, discrimination, market structure, and market integration.[6] In light of such multiplicity, two categories of competitive harm can be distinguished according to the types of the direct injury-bearing party: (1) competitive harm on trading counterparts (including suppliers and customers), and (2) competitive harm on competitors.[7] Nonetheless, these two categories are not mutually exclusive, in the sense that a type of competitive harm could be reaching towards the competitors by way of injuring the trading counterparts, and the other way around.

Secondly, it is not entirely settled as to how and to what extent competitive harm could be identified and elaborated. For example, one of the biggest discussions in competition law is how to choose between a form-based analytical approach and an effects-based one for finding the anticompetitiveness of a business practice in question.[8] The latter approach is becoming increasingly popular, thanks to the advancing understanding of competition

5 The Section of Antitrust Law of the American Bar Association, "Report on Antitrust Policy Objectives," February 12, 2003, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_policyobjectives.authcheckdam.pdf (accessed November 6, 2018). See the text following immediately footnote 4 of this report.

6 Witt, *More Economic Approach*, 114, 144–45. This is also observed in Sections 3.2–3.4 of Chapter 5 of this dissertation.

7 Jan Broullk, "Two Contexts for Economics in Competition Law: Deterrence Effects and Competitive Effects," *SSRN Electronic Journal* (2018): 14–16, https://doi.org/10.2139/ssrn.3180022 (describing two types of competitive effects: effects on customers and suppliers, and effects on competitors).

8 Viktor J. Vanberg, "Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy," in *Competition Policy and the Economic Approach: Foundations and Limitations*, ed. Josef Drexl, Wolfgang Kerber, and Rupprecht Podszun (Cheltenham: Edward Elgar Publishing, 2011), 62–63 (pointing out that the choice between a form-based and an effects-based approach is not easy to make when complicated by other issues, such as the fact that "competition agencies and their economic advisors are not perfect and subject to errors in their attempts to assess the overall welfare consequences in particular instances"). See also, Liza Lovdahl Gormsen, "Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU?," *World Competition* 36, no. 2 (2013): 224 (describing the debate in EU competition law regarding the extent of anticompetitive effects that should be demonstrated when assessing exclusionary practices).

economics.[9] In any event, these two approaches may diverge in terms of their theoretical support and factual emphases,[10] but they are both compatible with the conception of competitive harm.[11]

That being said, the concept of competitive harm is more aligned with the tenets of an effects-based approach. This is because an effects-based approach is more prone to establishing—as opposed to presuming—the actual or potential harm at stake. In other words, an effects-based approach is more aware of, and therefore puts more emphasis on the harm analysis, while relying less on generalization and form-categorization.[12] This alignment is under the premise that economic theories are the foundation of the competitive harm concept:

- Initially, economic theories underpin the goals of the law on abuse of dominance, and therefore set the tone for conceptualizing competitive harm. This is exemplified by the current trend of redefining the goals of competition law in light of consumer welfare.[13] Regarding this point, Section 1.3 uses the EU regime as an example to describe how economic theories are an essential force in shaping

9 Jürgen Basedow, "Introduction," in *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*, ed. Jürgen Basedow and Wolfgang Wurmnest, International Competition Law Series, vol. 47 (Alphen aan den Rijn: Kluwer Law International, 2011), 4 (pointing out that the "more economic approach" changes the focus from the type of a practice to the effects that the practice is likely to have). See also, Giulio Federico, "The Antitrust Treatment of Loyalty Discounts in Europe: Towards a More Economic Approach," *Journal of European Competition Law & Practice* 2, no. 3 (2011): 277–78 (describing a shift in EU competition law enforcement from a form-based approach to loyalty discounts analysis toward an effects-based one, which makes increasing use of economic knowledge).

10 Nicholas Economides and Ioannis Lianos, "The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the Microsoft Cases," *Antitrust Law Journal* 76, no. 2 (2009): 534–35 (describing the difference between a form-based approach and an effects-based one for assessing bundling practices); Wouter P. J. Wils, "The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance," *World Competition* 37, no. 4 (2014): 421–22 (noting the origin and the features of the "form-based" terminology and clarifying that "form-based" is not necessarily problematic); Nicolas Petit, "From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC," *World Competition* 32, no. 4 (2009): 485–86 (suggesting that the rationale behind a form-based approach is that a type of conduct "has, by its very nature, the ability to cause anti-competitive effects on the market").

11 Witt, *More Economic Approach*, 271 ("Restriction of competition by object and restriction of competition by effect do not refer to different types of competitive harm. The distinction relates to different tests and a different standard of proof.").

12 William J. Baer and David A. Balto, "The Politics of Federal Antitrust Enforcement," *Harvard Journal of Law & Public Policy* 23, no. 1 (1999): 120 (describing a shift in focus in the US antitrust enforcement from reliance on structural presumptions to reliance on the consumer welfare standard of anticompetitive harm).

13 Daniel Zimmer, "Protection of Competition v. Maximizing (Consumer) Welfare," in Basedow and Wurmnest, *Structure and Effects*, 31 ("Many industrial economists are in favour of an exclusive orientation of competition law on the aims of efficiency and welfare – be it total welfare, be it consumer welfare."). However, it is not agreed upon as to whether consumer welfare or social welfare should always be the overarching goal of competition law. See John J. Flynn, "Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction," *University of Pennsylvania Law Review* 125, no. 6 (1977): 1183–84. It is also not entirely clear as to what "consumer welfare" truly means. See Roger van den Bergh, Peter D. Camesasca, and Andrea Giannaccari, *Comparative Competition Law and Economics* (Cheltenham, UK: Edward Elgar Publishing, 2017), 95.

(the objectives of) the law.
- Subsequently, the development of economic theories shapes the ways to identify and to elaborate competitive harm in actual cases. This is discussed in the following section.

1.2 A Narrative to Explain the Harm

1.2.1 A Bridge between the Law and the Facts

"The overall objective of any system is to generate substantively sound outcomes".[14] That is where the "theory of harm" concept becomes relevant. This concept is an invention of practicality: since the application of law is a practice of praxis and sense-making,[15] and since the law on abuse of dominance prohibits conduct that harms the protected legal interest, it becomes necessary to describe how the unified legal provisions, along with their underlying legal objectives and principles, are applied to diverse factual scenarios.[16] In other words, there is a need for a narrative to explain exactly how a business practice could generate competitive harm and therefore should be found illegal under the law.[17] Such a narrative is a theory of harm.

As a bridge between abstract legal objectives and concrete factual scenarios, a theory of harm generally consists of two elements:
- *Methods for establishing the facts from the varying case circumstances*. To make relevant findings of fact, there is a need for the gathering and processing of information. This process could be costly and the outcome is likely to be imperfect, and therefore a decision-maker may have to make factual presumptions at a certain point.[18] To make such factual findings, economics is commonly used.
- *Legal principles and jurisprudence, which are derived from existing law, to account for the established (by proof and by presumption) facts*. After making the relevant findings of fact based on the (imperfect) information gathering and processing, it would be time to determine what legal standards should be applied accordingly.

14 William E. Kovacic and David A. Hyman, "Competition Agency Design: What's on the Menu?," *European Competition Journal* 8, no. 3 (2012): 535 (suggesting that the coherence of competition policy enforcement is the key to institutional legitimacy).

15 Sigrid Quack, "Legal Professionals and Transnational Law-Making: A Case of Distributed Agency," *Organization* 14, no. 5 (2007): 647–48.

16 Pablo Ibáñez Colomo, "Beyond the 'More Economics-Based Approach': A Legal Perspective on Article 102 TFEU Case Law," *Common Market Law Review* 53, no. 3 (2016): 726 ("Broad and vague prohibitions such as those found in Articles 101 and 102 TFEU have to be fleshed out and given an operational meaning in concrete factual scenarios.").

17 Carles Esteva Mosso, "The More Economic Approach Paradigm – An Effects-Based Approach to EU Competition Policy," in Basedow and Wurmnest, *Structure and Effects*, 19 (discussing the change brought by the effects-based approach upon the production of theories of harm in EU competition law).

18 Beckner and Salop, "Decision Theory and Antitrust Rules," 41–42; Ritter, "Presumptions in EU Competition Law," 190–91 (introducing factual presumptions as one of the several types of presumptions).

> In other words, at this stage, it would be necessary to clarify what kind of facts has what kind of legal implications. For example, after determining the market share of an undertaking, we would come to the question of how much legal significance this particular number should have. A market share matters only because it is a useful indicator of market power, but it is not the only indicator. In that sense, this element is more about the construction of legal reasoning, as it requires the making of judgment calls. However, it is not isolated from economic thinking, as the latter underpins the sensibility, and ultimately the legitimacy, of such legal reasoning.

Notably, serving as a bridge, a theory of harm merely provides an analytical framework. It does not dictate the analytical outcome. Instead, the outcome largely depends on the individual case circumstances.[19]

1.2.2 The Conduct-Specific and the Case-Specific Dimensions of a Theory of Harm

As mentioned above, the "theory of harm" expression is a practical invention for operationalizing the law. It could be presented as a concept, but it does not have any fixed templates. In an actual scenario, the narration of a theory of harm depends on two factors: the accused conduct at hand, and the available findings of fact at hand relating to that conduct. Therefore in different case scenarios, different theories of harm could be narrated, depending on two varying parameters:

(1) The type of conduct in question, and
(2) The factual scenario at hand.

First, different types of conduct entail (at least conceptually) different theories of harm. Under the premises that competitive harm stems from the implementation of a (potentially abusive) practice, and that all dominance-abuse practices could be categorized (at a certain level) into different types, one could infer that a particular type of abuse could generate one or multiple types of competitive harm. In the event that two types of abuse generating the same cluster of competitive harm, these two types of abuse could still have different mechanisms to realize such harm. Therefore, one would expect at least one theory of harm identifiable for each type of abuse. Such a theory of harm might concur, to a certain extent and in certain aspects, with a theory of harm of another type of abuse.

The second parameter refers to the individual case circumstances. The idea is that, although ideally a particular type of conduct promises the narration of a theory of harm, one could only attain variations of that theory of harm in actual cases involving the same type of conduct. This is because the individuality of each case inevitably results in discrepant

19 Lars-Hendrik Röller, "Economic Analysis and Competition Policy Enforcement in Europe," in *Modelling European Mergers: Theory, Competition Policy and Case Studies*, ed. Peter A. G. van Bergeijk and Erik Kloosterhuis (Cheltenham: Edward Elgar, 2005), 16.

findings of fact concerning the conduct in question. For example, the circumstances of a current case may lack certain findings made in previous cases where theories of harm on the same type of conduct were constructed; or alternatively, a current case may contain new findings of fact that were not present in previous cases. Either way, a case-specific variation on the theory of harm narration would ensue.

1.2.3 The Possibility of Inter-Temporal Change and the Counterbalancing Need for Coherence

A conduct-specific and case-specific theory of harm could change, as the economic perceptions advance and the analytical focus or perspective shifts. This is because economic thinking is an essential component of a theory of harm (discussed in Section 1.3 of this chapter).[20] Therefore, from an inter-temporal perspective, a theory of harm as such could evolve over time because of the advancing theoretical understanding. For instance, at the conduct-specific level, advancing economic thinking has induced reflections on the classification of abuses of dominance, not to mention its impact at the case-specific level.[21]

Nonetheless, this inter-temporal change is constrained by the fact that it is based on the versions of theory of harm produced in the past. This constraint can be described as the need for coherence, and is justifiable in light of legal certainty.[22] For example, a case decision by the law enforcer is normally expected to serve as a point of reference for undertakings to self-assess their business practices in the future.[23] The lack of coherence to a serious extent would render all of the case decisions by the law enforcer unable to provide legal guidance, and consequently would undermine those decisions' credibility as precedents in the long run.[24]

In light of the tension between the possibility of change and the need for coherence, there are at least two pointers for the production of a theory of harm. First, as a narrative

20 William E. Kovacic, "The Modern Evolution of U.S. Competition Policy Enforcement Norms," *Antitrust Law Journal* 71, no. 2 (2003): 401 (describing the crucial role of economic theory in elaborating antitrust doctrines, which makes competition policy evolutionary, "as understanding about the operation of the economy grows").

21 Colomo, "Beyond the 'More Economics-Based Approach'," 727 (suggesting that "there are compelling reasons to question the legal status of some practices under Article 102 TFEU", particularly "the classification of some conduct as abusive by its very nature").

22 D. Daniel Sokol, "Antitrust, Institutions, and Merger Control," *George Mason Law Review* 17 (2010): 1061 (pointing out the importance of quality-assessment of antitrust outputs in the spirit of legal certainty). See also, Beckner and Salop, "Decision Theory and Antitrust Rules," 51 (explaining the incentive of a judicial antitrust decision-maker to promote legal certainty from the viewpoint of setting optimal deterrence).

23 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity Press, 1996), 198.

24 Ibid., 199.

"rationalizing" the anticompetitiveness of a practice,[25] a theory of harm should be *self-explanatory*. Secondly, it should be *replicable*, meaning that technically anyone who applies the same logic to the same facts should be able to reach the same conclusion. The underlying idea is that, if the results of an analysis cannot be replicated, such results cannot be verified.[26] In that sense, a theory of harm—at least the fact-finding part of it—should be able to be followed repeatedly and objectively by stakeholders from all sides.

1.3 The Co-Foundational Role of Economic Theories: Article 102 TFEU as an Example

As mentioned in Section 1.1, this dissertation adopts the premise that economic theories play a co-foundational role in the theory of harm production. This co-foundational role stems from the fact that economic theories help define the goals and objectives overarching an abuse of dominance legal regime, together with the regime-specific policies and ideologies.[27] This subsection uses the legal regime under Art 102 TFEU as an example to clarify that premise. To conserve space, this subsection describes the relevant economic theories at a rather general level according to the widely acknowledged classification of several antitrust schools of thought.

1.3.1 Ordoliberalism

1.3.1.1 The Freiburg School

Although different views exist as to what schools of thought underpinned the creation and the evolution of EU competition law,[28] one that has never been excluded from discussion is ordoliberalism, which originated from the Freiburg School on law and economics in the 1930s in Germany. Two primary points can be noted about ordoliberalism:

- It takes a skeptical stance against private economic power (private "Macht"), claiming, among other things, that uncontrolled existence of private power could collude with public power and together they would lead to totalitarianism.[29]
- To prevent such devastating outcomes, ordoliberalism advocates the incorporation

25 Ariel Ezrachi, "Sponge," *Journal of Antitrust Enforcement* 5, no. 1 (2017): 60 (using the metaphor of sponge to describe how political considerations are rationalized by economic thinking and therefore established as the legal interest to be protected under antitrust law).

26 Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd ed. (London: Sweet & Maxwell, 2010), 9–005.

27 Flynn, "Antitrust Jurisprudence," 1183–85 (highlighting, from the perspective of legal realism, the importance of regime-specific ideological values in shaping the antitrust jurisprudence).

28 Sigfrido M. Ramírez Pérez and Sebastian van de Scheur, "The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]," in *The Historical Foundations of EU Competition Law*, ed. Kiran Klaus Patel and Heike Schweitzer (Oxford: Oxford University Press, 2013), 19–20. See also, Frank Maier-Rigaud and Daniel Zimmer, "On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete," in Zimmer, *The Goals of Competition Law*, 139.

29 Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart Publishing, 1997), 99.

> of market supervision in a constitutional framework, in order to preserve the process of competition from distortions of private power.[30]

Ordoliberalism was born in the 1930s to reflect the political and economic reality of that time: Germany was the land of cartels, resulting in a situation where undertakings were being coerced to collude or otherwise being forced out of competition.[31] Against that background and the background of growing Nazism, a number of lawyers and economists gathered in the University of Freiburg and began to rethink the relationship between economy and the political system, especially the relationship between economics and its legal foundations. Among those scholars were Franz Böhm and Walter Eucken. They thought that highly concentrated economic power (as they put it, "monopoly") should be prohibited as such, because it would erode political democracy, and in reverse, a totalitarian political system would destroy liberal market economy.[32] According to Eucken, in order for a society's political system to function properly, it is necessary to construct a well-functioning economic order. To that end, he assigned a vital role to competition, and suggested that the law must establish and maintain an order of competition, namely a competitive process.[33]

Classical liberalism, represented by Adam Smith, claimed that a process of free competition, serving as the "invisible hand", would contribute to enhancing the general welfare of the society.[34] Ordoliberalism agrees, but is distrustful of the absolute self-correction mechanism of the market.[35] Therefore, it suggests that such a process of free competition could be achieved only if it is embedded in a constitutional framework, the core of which is the supervision of competition by means of law.[36] In that sense, ordoliberalism has a particular conception of competition law: to achieve the ultimate goal of protecting the economic and political freedom of individuals, it is necessary "to translate the economic principles that govern markets into legal principles".[37] In other words, competition law must construct and maintain the conditions under which competition would flourish, and must prevent deviations from the competitive process.[38] Disempowering ("Entmachtung") private

30 Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (The Hague: Kluwer Law International, 2002), 10.

31 Amato, *Antitrust and the Bounds of Power*, 40.

32 Elias Deutscher and Stavros Makris, "Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus," *The Competition Law Review* 11, no. 2 (2016): 186–88. See also, Bergh, Camesasca, and Giannaccari, *Comparative Competition Law and Economics*, 31.

33 Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics* (Oxford: Oxford University Press, 2012), 1.45.

34 Adam Smith, *Wealth of Nations*, Book IV, Ch. II (Hoboken, N.J.: Generic NL Freebook Publisher, n.d.), 400.

35 Norman P. Barry, "Political and Economic Thought of German Neo-Liberals," in *German Neo-Liberals and the Social Market Economy*, ed. Alan Peacock and Hans Willgerodt (London: Palgrave Macmillan UK, 1989), 108, https://doi.org/10.1007/978-1-349-20148-8.

36 Deutscher and Makris, "Exploring the Ordoliberal Paradigm," 193.

37 Peter Behrens, "The 'Consumer Choice' Paradigm in German Ordoliberalism and Its Impact upon EU Competition Law," *SSRN Electronic Journal* (2014): 12, https://doi.org/10.2139/ssrn.2568304.

38 Deutscher and Makris, "Exploring the Ordoliberal Paradigm," 194.

economic power would be the core task of competition law,[39] because both the existence of such power and the exercise thereof are distortions of competition. Also, according to Eucken, effective competition must be fostered in all markets, and in the case of special markets that are not open to competition, artificial policy should be installed to make sure that market operators act "as if" they are in a competitive situation.[40]

Böhm and Eucken represented the first wave of ordoliberalism. It gradually developed into the second wave, which absorbed thoughts from Hayek and was represented by Hoppmann and Mestmäcker. The second wave of ordoliberalism took a fundamental turn: it no longer advocates the abolishment of private power as such, but thinks dominant undertakings should have the freedom to compete as well.[41] Scholars following the second wave suggested that institutionally it is preferable to entrust the law-application responsibilities to the judiciary, instead of administrative agencies with discretionary powers.[42]

1.3.1.2 Ordoliberal Impacts on EU Competition Law

This dissertation finds that ordoliberalism was crafted into EU competition law (or at least was able to influence the policy development) through two channels.

The first one was the construction of the competition legal framework. When clarifying the legal objectives, Art 3(f) of the EEC Treaty (the Treaty of Rome) established the protection of competition process as one of the two guidelines for interpreting the EEC competition law (the other one being market integration). This Treaty provision provided that the Community should establish a system ensuring that competition in the internal market is not distorted. This objective corresponded with the second-wave ordoliberal view that the virtue of competition lies in competition being a rivalry process to protect individual economic freedom.[43] Art 3(f) remained intact until the Treaty of Lisbon, which moved it to the equally binding Protocol 27.[44] After being established as an objective of EC competition

39 Amato, *Antitrust and the Bounds of Power*, 100.

40 Deutscher and Makris, "Exploring the Ordoliberal Paradigm," 208. See also, Bergh, Camesasca, and Giannaccari, *Comparative Competition Law and Economics*, 32 (explaining the concept of "as if" competition).

41 René Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (Liège: Facultè de droit, 1970), 248.

42 Heike Schweitzer and Kiran Klaus Patel, "EU Competition Law in Historical Context: Continuity and Change," in Patel and Schweitzer, *The Historical Foundations of EU Competition Law*, 211, 228 (highlighting the importance of judicial supervision in shaping EU competition policy, and expressing the concern for the politicization of competition law in the absence of judicial control).

43 According to the German scholar Peter Behrens, originally the Freiburg School ordoliberalism viewed competition as static by defining restraints to competition as deviations from perfect competition, but this view was abandoned in later ordoliberal developments, which perceived competition as a rivalry process and therefore recognized the rationality of attaining market power. See Peter Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position and Its Impact on Article 102 TFEU," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 9, 2015), 9, 15–16, https://papers.ssrn.com/abstract=2658045 (accessed November 7, 2018).

44 Art 51 of the TEU ensures the equal status of Treaty provisions and Protocols.

law for all these years, the protection of the competitive process has successfully become a guiding doctrine of the CJEU's case ruling, which is a major contributor to the continuous development of EU competition law.[45] Furthermore, ordoliberal thinking was fabricated into the wordings of Articles 85 and 86 of the EEC Treaty (now Articles 101 and 102 of the TFEU), which have been the primary source of EU competition law. It was observed that the insertion of these two provisions was mainly the result of the German efforts, and that the substance largely reflected the ordoliberal way of thinking that was dominant in Germany.[46]

The second channel was the appointment of Community officials and staffing. At the top level, Walter Hallstein, Hans von der Groeben, and Alfred Müller-Armack, all of who embraced ordoliberal ideas,[47] were appointed respectively as the first president of the European Commission, the first Commissioner for competition policy, and the German Secretary of State for European Affairs. As the Commission gained increasing autonomy and power after the adoption of Regulation 17/62,[48] the theoretical background and preference of ordoliberal officials became even more influential. This was exemplified by the visions and activities of the DG IV under the leadership of Hans von der Groeben.[49]

There is no consensus on how important of a role that ordoliberalism has been playing in shaping EU competition policy. For example, some scholars argued that ordoliberalism was never the theoretical foundation of Art 102 based on the examination of the *travaux préparatoires* of the EEC Treaty.[50] Others took a less drastic stance, but nonetheless suggested that ordoliberalism had fallen from grace in later development stages, due to the fact that the protection of the competitive process did not offer a precise analytical framework, and the problem that protecting the competitive process could be easily confused with protecting the competitors.[51] In addition, it was argued that later developments of economic theories overshadowed ordoliberalism by providing analytical models and tests that had not been available when ordoliberalism was originally brought up.[52] Against these arguments, German scholars, such as Peter Behrens, argued that ordoliberalism has been consistently adaptive and therefore should not be diminished as referring only to the Freiburg School.[53] On that basis, he defended the ordoliberalism as the foundation of EU competition policy

45 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 22; Deutscher and Makris, "Exploring the Ordoliberal Paradigm," 196–99.

46 Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position," 26.

47 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 23.

48 David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 2001), 349–352.

49 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 24–25.

50 Pinar Akman, "Searching for the Long-Lost Soul of Article 82EC," *Oxford Journal of Legal Studies* 29, no. 2 (2009): 277.

51 Hildebrand, *Role of Economic Analysis*, 162.

52 Schweitzer and Patel, "EU Competition Law in Historical Context," 220.

53 Behrens, "The 'Consumer Choice' Paradigm in German Ordoliberalism," 18; "The Ordoliberal Concept of 'Abuse' of a Dominant Position," 8.

by demonstrating the connections of ordoliberal claims with Art 3(f) of the EEC Treaty, with the inscription of exclusionary abuses, and with some CJEU landmark cases.[54]

Irrespective of how important ordoliberalism was in shaping EU competition policy, it should be noted that the influence of ordoliberalism was not exclusive. For example, it was suggested that there were other mitigating forces at the same time of ordoliberalism's prevalence, such as neo-corporatism, which claimed that the competitive process could be compromised for achieving other economic and social interests.[55] Scholars of ordoliberalism acknowledged this. For example, they claimed that the stipulation of exploitative abuse in Art 86 was in fact a concession to the French delegates' stance of promoting welfare through a more state-based interventionist approach.[56] In that light, it is necessary to continue examining other theoretical elements underpinning Art 102 as well as Art 101.

1.3.2 The Harvard School

1.3.2.1 Workable Competition

John M. Clark, a pioneer of institutional economics, proposed the concept of workable competition, with the aim to provide a more feasible framework for the application of economic theories. He defined workable competition as "the most desirable form of competition, selected from those that are practically possible, within the limits set by conditions which we cannot escape".[57] "Workable competition" is a normative concept, as it judges whether a certain form of competition is good or bad, and tries to develop conditions that can foster such competition.[58] It is the starting point of the Harvard School: inspired by Clark's proposition, a number of publications began to focus on the structural elements of markets,[59] thus forming the so-called Harvard School.

1.3.2.2 The S-C-P Paradigm and the Beginning of Industrial Organization

Edward S. Mason and Joe Bain, two prominent spokespersons for the Harvard School, invented the Structure-Conduct-Performance ("S-C-P") analytical paradigm.[60] This paradigm holds the premise that there is a causative chain trickling down the three elements.[61] It pursues the maximization of market performance, or, as referred to by Mason, "the protection

54 Behrens, "The 'Consumer Choice' Paradigm in German Ordoliberalism," 24–25; "The Ordoliberal Concept of 'Abuse' of a Dominant Position," 11, 22–24.

55 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 28.

56 Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position," 17.

57 J. M. Clark, "Toward a Concept of Workable Competition," *The American Economic Review* 30, no. 2 (1940): 253.

58 Hildebrand, *Role of Economic Analysis*, 122.

59 Ibid., 126.

60 Herbert Hovenkamp, *The Opening of American Law: Neoclassical Legal Thought, 1870-1970* (Oxford: Oxford University Press, 2014), 214.

61 Luc Peeperkorn and Vincent Verouden, "The Economics of Competition," in *The EU Law of Competition*, ed. Jonathan Faull and Ali Nikpay, 3rd ed. (Oxford: Oxford University Press, 2014), 6. See also, Bergh, Camesasca, and Giannaccari, *Comparative Competition Law and Economics*, 66.

of public interests", which was understood as the maximized allocation of resources and stability of production. [62] To that end and based on the trickling-down causal link, Harvard scholars upheld the construction and preservation of healthy market structures as the guiding star of their economic analyses.[63]

Mason elaborated the "structure" element as having the following components: the product's economic characteristics, the firm's cost and production conditions, the numbers and sizes of upstream sellers and downstream buyers, demand conditions, and the nature of the distribution channels.[64] Harvard scholars claimed that these structural components could induce or influence various market practices, including collusion, discriminatory pricing, predatory pricing, and R&D planning.[65]

The S-C-P paradigm laid the ground for countless studies in the 1930s and 1940s that were aimed at discovering the economic roadmap of how market structure could impact conduct. The fruit of these studies is now referred to as industrial organization.[66] Since the very beginning, industrial organization has been focusing on empirical analysis to confirm the S-C-P link across various industries.[67] Supported by the outputs of industrial organization, the S-C-P paradigm became the mainstream thinking for antitrust policymaking from the 1940s to the late 1960s.[68]

1.3.2.3 Impacts on EU Competition Law

Both the notion of workable competition and the S-C-P paradigm contributed to the development of EU competition law. The notion of workable competition caught the attention of the Community officials in the 1960s for its practicality, a virtue that the policymakers were seeking. This was evidenced by a working document prepared by the DG IV and several publications by Groeben in the 1960s.[69]

62 Edward S. Mason, "Monopoly in Law and Economics," *The Yale Law Journal* 47, no. 1 (1937): 40, 49; Hildebrand, *Role of Economic Analysis*, 128.

63 Hildebrand, *Role of Economic Analysis*, 129.

64 Edward S. Mason, "Price and Production Policies of Large-Scale Enterprise," *The American Economic Review* 29, no. 1 (1939): 69.

65 Hildebrand, *Role of Economic Analysis*, 127.

66 Lynne Pepall, Dan Richards, and George Norman, *Industrial Organization: Contemporary Theory and Empirical Applications*, 5th ed. (Hoboken, NJ: Wiley, 2014), 8.

67 Stephen Martin, *Industrial Economics: Economic Analysis and Public Policy*, 2nd ed. (New York: Maxwell Macmillan International, 1994), 8.

68 Dennis C. Mueller, "Lessons from the United States's Antitrust History," *International Journal of Industrial Organization* 14, no. 4 (1996): 418, https://doi.org/10.1016/0167-7187(95)00490-4.

69 Brigitte Leucht and Mel Marquis, "American Influences on EEC Competition Law," in Patel and Schweitzer, *The Historical Foundations of EU Competition Law*, 140.

The influence of the S-C-P paradigm on EU competition law is profound and at the same time subtle. It was crafted in EU competition law in the following two ways. First, it served as a tool for promoting market integration. By focusing on the preservation of an open and contestable market structure, this paradigm fitted seamlessly with the mandate of European market integration, which was prioritized as the core objective of EC competition law in the early years.[70] This was evidenced by the *Continental Can* case, in which the Court of Justice of the European Communities (hereinafter, "the ECJ") accepted the Commission's argument that a merger could breach Art 86 by altering the competitive structure of the market in question.[71]

Secondly, the S-C-P paradigm supplemented the ordoliberal thinking. Aimed at guiding antitrust policymaking and assisting law enforcement,[72] the S-C-P paradigm shared with ordoliberalism the idea of integrating economic analyses into the legal order.[73] In that sense, this paradigm offered ordoliberalism an answer to the constructive question of how to carry out public intervention on private market power, as it provided a rather clear and consistent framework in which the legality of various practices could be examined.[74] This solution was furthered by the booming empirical studies of industrial organization from the 1940s onwards, as those studies were dedicated to empirically verify the S-C-P links.[75]

However, the S-C-P paradigm as an analytical framework did not manifest itself in EU competition law until in 1971 when the Commission activated Art 86 of the EEC Treaty in the *Continental Can* case. In this case, the Commission applied Art 86 to block a merger. As summarized in the ECJ's judgment, the Commission applied an analytical model that clearly focused on the preservation of market structure.[76] Since the reasoning of its decision was not questioned by the ECJ, the Commission began to develop this analytical model thereon.[77] In sum, the S-C-P paradigm took roots in EU competition law ever since the Commission began to regulate abuse of dominance, if not since the anticompetitive agreements regulation. As described in the following subsections, although the original conceptions about the S-C-P causal link may have changed, the categorization of structure, conduct, and performance was passed on.

70 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 43, 53.

71 Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission of the European Communities* [1973] ECR 215, paras 26, 27 (hereinafter, "*Continental Can*").

72 Pepall, Richards, and Norman, *Industrial Organization*, 8–9.

73 Gerber, *Law and Competition in Twentieth-Century Europe*, 245.

74 Hildebrand, *Role of Economic Analysis*, 165.

75 Pepall, Richards, and Norman, *Industrial Organization*, 9.

76 *Continental Can*, paras 28 and 29 (note 71 above).

77 Hildebrand, *Role of Economic Analysis*, 165.

1.3.3 The Chicago School

1.3.3.1 Attacks on the S-C-P Paradigm

The original S-C-P proposition by the Harvard School had its flaws. As empirical studies of industrial economics in the 1950s and 1960s tried to confirm this proposition, inconsistent observations began to emerge. These inconsistent observations suggested that there could be different ways to interpret the empirical evidence, leading to alternative conclusions.[78] One major criticism was that the S-C-P paradigm treated structure "as exogenous—a factor that determines firm behavior but is not determined by it".[79] Against this backdrop, a group of economists and lawyers proposed a different version of antitrust policy that strives for efficiency. This became the beginning of the Chicago School, which came into horizon in the 1960s and grew throughout the 1970s.[80] By the 1980s, it had become the mainstream antitrust school of thought in the US.[81]

The Chicago School's antitrust ideas were based on its criticisms of the Harvard School, and they could be summarized as follows. First, the Chicago School claimed that the sole goal of antitrust policy should be the maximization of consumer welfare, and it construed consumer welfare as an equivalent of economic efficiency that includes two aspects: allocative efficiency and productive efficiency.[82] Since the Chicago School never took a stand on how welfare should be distributed among different interest groups, equating consumer welfare with economic efficiency suggests that Chicago's understanding of consumer welfare was actually total welfare for the whole society.[83]

Accordingly, the Chicago School had a completely different take on the consequential links around the element of "conduct" in the S-C-P paradigm. For example, the Chicago School rejected the Harvard idea that high concentration leads to high prices (and therefore high profits) and consequently poor market performance (economic inefficiency).[84] Instead, it claimed that there is no clear evidence suggesting a link between concentration and market performance, and that competition among a few firms can be just as effective as competition among many.[85] Moreover, the Chicago School reversed Harvard's causal link:

78 W. Kip Viscusi, Joseph Emmett Harrington, and John M. Vernon, *Economics of Regulation and Antitrust*, 4th ed. (Cambridge, Mass: MIT Press, 2005), 62.

79 Pepall, Richards, and Norman, *Industrial Organization*, 11. See also, Bergh, Camesasca, and Giannaccari, *Comparative Competition Law and Economics*, 66.

80 Peeperkorn and Verouden, "The Economics of Competition," 7.

81 Eleanor M. Fox, "What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect," *Antitrust Law Journal* 70, no. 2 (2002): 378.

82 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 51, 59.

83 Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford: Hart Publishing, 2012), 28–29.

84 William Lee Baldwin, *Market Power, Competition and Antitrust Policy*, Irwin Publications in Economics (Homewood, Ill: Irwin, 1987), 306.

85 Hildebrand, *Role of Economic Analysis*, 146, 148.

it argued that it is efficiency (performance) that determines concentration (structure).[86] In that sense, it viewed concentration as a good thing, suggesting that concentration is a necessary means to achieve efficiency, and that concentration actually makes collusion between competitors more detectable.[87]

Secondly and based on the first point, the Chicago School advocated a non-interventionist approach to antitrust policymaking. An extreme stance of the Chicago School would claim that no antitrust law is necessary, and that the only thing hindering competition is actually government intervention. From a less drastic stance, it encouraged antitrust policy to focus only on cartels and horizontal mergers (thus refraining from abuse of dominance enforcement).[88] In fact, the Chicago School viewed most unilateral practices—such as refusal to deal, vertical foreclosure and exclusive dealing—as *per se* legal, or at least justifiable by efficiency.[89] In the case of cartel enforcement, Chicagoans usually held a lenient attitude, as they considered cartel agreements to be highly unstable and temporary.[90]

1.3.3.2 The Theoretical Confinement

Unlike the situation where the Harvard School was nourished by empirical studies of industrial organization, the Chicago School relied primarily on hypothetical assumptions and reasoning.[91] In fact, of all the schools of thought introduced in this section, the Chicago School stands out as the more "ideologically charged" one, whereas the other schools of thought are more methodology-based. For example, the Chicago School adopted the neoclassical model of perfect competition as the theoretical basis for analyzing industrial markets.[92] Also, it viewed competition as a dynamic process that evolves towards the ever-changing equilibrium of perfect competition.[93] Under these premises, it confidently assumed the self-correction ability of the market. In other words, it believed that unless there is sufficient evidence suggesting the market is being disturbed, what the market is offering now would be the best it can offer.[94] Accordingly, it claimed that any market power generated during that process would only be transitory, as long as technological development and market entry are uninhibited.[95]

86 Peeperkorn and Verouden, "The Economics of Competition," 6–7.

87 Hildebrand, *Role of Economic Analysis*, 146.

88 Richard A. Posner, "The Chicago School of Antitrust Analysis," *University of Pennsylvania Law Review* 127, no. 4 (1979): 928.

89 Herbert Hovenkamp, "The Harvard and Chicago Schools and the Dominant Firm," in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust*, ed. Robert Pitofsky (Oxford: Oxford University Press, 2008), 110–11.

90 Posner, "The Chicago School of Antitrust Analysis," 928.

91 Martin, *Industrial Economics*, 9.

92 George Joseph Stigler, *The Organization of Industry* (Chicago: University of Chicago Press, 1983), 5.

93 Hildebrand, *Role of Economic Analysis*, 144, 145.

94 Melvin W. Reder, "Chicago Economics: Permanence and Change," *Journal of Economic Literature* 20, no. 1 (1982): 12.

95 Ibid., 15.

That was where the Chicago School incurred criticism. Namely, by using its own theoretical model as the benchmark to assess factual scenarios and to appraise all research, the Chicago School became highly fixated on its own assumptions and hostile to industrial organization studies,[96] and consequently failed to accommodate empirical evidence that suggested alternative conclusions.[97] For example, empirical studies did not support Chicago's view that concentration is purely the result of efficiency; instead, they suggested that concentration could be attributed to market power, which was not as innocent as Chicago presumed and therefore was indicative of the lack of competition.[98]

1.3.4 The Post-Chicago School

1.3.4.1 A Calibration of the Chicago School

As discussed above, both the S-C-P paradigm and the Chicago School had their theoretical weaknesses. It was against this backdrop that the Post-Chicago School began to grow in the 1980s. As the name suggested, the Post-Chicago School was based on thoughts of the Chicago School, and it was dedicated to patch up the weaknesses of the Chicago School by appreciating the complexity of factual scenarios.[99]

The Post-Chicago School's calibrations of the Chicago School can be described from two aspects. First, it had an analytical approach different from the Chicago School's. While the Chicago School adopted a deductive approach relying heavily on certain theoretical assumptions, the Post-Chicago approach was less ideologically driven and more open-ended. In other words, the Post-Chicago School made many efforts to account empirical evidence and thereby formulating more particularized theoretical models,[100] whereas the Chicago School tended to discard analytical outcomes that were inconsistent with its theoretical premise (namely price theory).[101] Unlike the Chicago School, the Post-Chicago School had no interest in aligning analytical models or controlling analytical outcomes.[102]

Secondly, their conceptions of antitrust policy were different. The Post-Chicago School rejected the Chicago School's idea that consumer welfare equals economic efficiency. It looked closely at the original intentions of US antitrust law, and argued that the welfare fruits, namely competitively priced goods, should belong to consumers instead of cartelists. Therefore it argued that antitrust law should be concerned with not only efficiency but

96 Posner, "The Chicago School of Antitrust Analysis," 928–929, 931.

97 Reder, "Chicago Economics," 13.

98 Hildebrand, *Role of Economic Analysis*, 148.

99 Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," *Columbia Business Law Review*, no. 2 (2001): 258, 336.

100 Lawrence A. Sullivan, "Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World," *Antitrust Law Journal* 63, no. 2 (1995): 670, 674.

101 Reder, "Chicago Economics," 13.

102 Sullivan, "Post-Chicago Economics," 671, 673.

also wealth transfer.[103] In addition, based on its verifications of empirical evidence, the Post-Chicago School saw more instances of market imperfections and barriers to entry than the Chicago School did, and therefore advocated stricter antitrust policies.[104]

1.3.4.2 New Developments of Industrial Economics

The prevalence of the Post-Chicago School was closely connected with the development of Industrial Organization Economics, as the latter supplied a substantial amount of economic understanding at a micro level. For a start, both Post-Chicago and Industrial Economics emphasized the importance of the verification of economic theories.[105] Moreover, Post-Chicago used fruits of Industrial Economics to refute the proclamations made by the Chicago School.[106] This was especially the case after the development of Industrial Economics towards game theory and behavioral studies. Referred to as the new Industrial Organization ("new IO"), this development started in the late 1980s and focused on using game theory to examine strategic behavior in contexts of imperfect competition (such as oligopoly).[107] In that regard, the new IO and Post-Chicago thinking are well aligned and mutually supportive. For example, by using the Industrial Economic theory of oligopoly and exclusion,[108] a number of Post-Chicago scholars convincingly explained why vertical and conglomerate mergers could cause anticompetitive concerns.[109]

However, compared with the success of Post-Chicago and new IO in revolutionizing antitrust theories, their normative impacts are rather obscure. The problem lies in the fact that, by building their essential presumptions on diversified factual scenarios, the Post-Chicago School and the new IO did not provide testable hypotheses based on which consistent and repeatable conclusions could be produced.[110] In other words, while they strived to provide more accurate economic analyses, they also generated evidentiary complexity and uncertainty that were very difficult to be reconciled with the manageability of evidence and the risk of Type I error (false positive).[111] In that sense, the contributions of Post-Chicago and new IO to the development of EU competition law are limited to less normative and less ideological levels, such as the shift of assessment approach (to a more case-by-case approach) and the advancement of empirical techniques.[112]

103 Hildebrand, *Role of Economic Analysis*, 150.

104 Hovenkamp, "Post-Chicago Antitrust," 267.

105 Sullivan, "Post-Chicago Economics," 670.

106 Hildebrand, *Role of Economic Analysis*, 152–153.

107 Richard Schmalensee, "Industrial Economics: An Overview," *The Economic Journal* 98, no. 392 (1988): 643.

108 Ibid., 660, 663.

109 Sullivan, "Post-Chicago Economics," 673–674. For an example on this point, see generally Michael H. Riordan and Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," *Antitrust Law Journal* 63, no. 2 (1995): 513–68.

110 Michelle M. Burtis, "Modern Industrial Oranization: A Comment," *George Mason Law Review* 12, no. 1 (2003): 42. See also, Hovenkamp, "Post-Chicago Antitrust," 271.

111 Burtis, "Modern Industrial Oranization," 45. See also, Hovenkamp, "Post-Chicago Antitrust," 269, 273.

112 Peeperkorn and Verouden, "The Economics of Competition," 8.

1.3.5 Two Sides of Consideration for Applying Economic Theories

Presumably, the risks of Type I (false positive) and Type II (false negative) errors are prevalent in antitrust enforcement.[113] It was suggested that the risk of Type I error is even more imminent than that of Type II error, since antitrust law enforcers (including both agencies and courts) have the inhospitable tendency to "view each business practice with suspicion, always wondering how firms are using it to harm consumers".[114]

Against that background, it could be said that the abovementioned economic theories help to reduce the risks of Type I and Type II errors made by the law enforcers, because they are all aimed at providing better understanding of the anticompetitiveness of a business practice and more accuracy in identifying such anticompetitiveness in real scenarios. Nonetheless, these theories are only able to reduce the risks to a certain extent; moreover, they could generate their own false positives and false negatives. This is because they may not have the perfect knowledge on the anticompetitiveness of a practice when they are in such a continuous process of refinement (by later schools of thought) as described in the previous subsections. Therefore, an emphasis on the economic theories could reduce (but not eliminate) the risks of Type I and Type II errors in real cases. On that account, the increased use of economic theories could be attractive to law enforcers, for it enhances the justifiability of their enforcement outcomes.

However, there is also a less attractive side that needs to taken into consideration. First, the application of economic theories adds to the enforcement costs of an antitrust regime.[115] More importantly, one has to take into account the law enforcers' supposed responsibility of providing legal certainty in their enforcement activities.[116] Under the assumption that the application of economic theories is aimed at providing accuracy in individual cases, one challenge posed before the law enforcers—especially the courts—is how they should balance the desire for *economic accuracy* and the need for *legal certainty*.[117] To further complicate the situation, it was observed that economic theories and tools might not be as

113 Thomas A. Lambert and Alden F. Abbott, "Recognizing the Limits of Antitrust: The Roberts Court versus the Enforcement Agencies," *Journal of Competition Law & Economics* 11, no. 4 (2015): 796–97.

114 Frank H. Easterbrook, "Limits of Antitrust," *Texas Law Review* 63, no. 1 (1984): 4; "Does Antitrust Have a Comparative Advantage?," *Harvard Journal of Law & Public Policy* 23, no. 1 (1999): 8 ("The conditions for useful legal intervention may be met when we know a lot about the practice and can condemn or approve it out of hand. But when we know but little the risk of error goes up, and the risk of false positives may be substantial.").

115 Easterbrook, "Limits of Antitrust," 16 (identifying three types of costs of an antitrust legal system, one of which is the system's operational costs). See also, Lambert and Abbott, "Recognizing the Limits of Antitrust," 796–98.

116 Phillip Areeda, "Introduction to Antitrust Economics," *Antitrust Law Journal* 52, no. 3 (1983): 534 (highlighting that "the legal system inevitably operates in a world where the real facts are obscure and where only rough assessments are possible, and where relatively simple rules are necessary to guide private action and to permit courts to act with a modicum of consistency").

117 Here, the concept of legal certainty mainly refers to the positive functions of case precedents. For an elaboration of such functions, see Emily Sherwin, "Judges as Rulemakers," *The University of Chicago Law Review* 73, no. 3 (2006): 926–27.

accurate as they are expected to be,[118] and therefore the application of economics within an established legal framework may have to be based on numerous presumptions, extensive analytical efforts, and decision-making with imperfect information.[119]

In the EU competition law context, these two sides of consideration are best exemplified in the ongoing discussion on how to accommodate a "more economic approach" in the existing legal framework, a major part of which is the CJEU case law.[120] It is a hypothesis of this dissertation that different institutions (specifically, enforcement agencies and courts) balance these two sides differently, due to the different institutional functions they are entrusted with. To confirm that hypothesis, Chapter 5 compares the theories of harm of the Commission and the CJEU in the selected cases.

2 The "Agency-Court" Dynamics in the Law Enforcement

By adopting the concept of theory of harm, this dissertation emphasizes the "elements of continuity and the cumulative nature" of the law enforcement on abuse of dominance.[121] Under the premise that institutional discourse shapes policy,[122] the concept of theory of harm can be linked to institutional dynamics, in the sense that the dynamics between different enforcers of the law are an impact factor on the production of theories of harm.[123] The most relevant set of institutional dynamics is between the administrative agencies and the courts. This section discusses this impact factor.

2.1 An Institutional Perspective

From the perspective of policy-making and governance, the application of a law is the interplay between various legal actors, in the sense that it is defined by the dynamics between two conditions of existence: Internally, the law exists on the basis of its own structure. Externally, it exerts impact that is essential for the economic functioning of a

118 Ken Heyer, "A World of Uncertainty: Economics and the Globalization of Antitrust," *Antitrust Law Journal* 72, no. 2 (2005): 378–79 (pointing out the pitfall that "the new and improved economic tools, their high degree of sophistication, and emphasis on quantitative prediction risk leaving one with a false sense as to their accuracy and precision").

119 Anne-Lise Sibony, "Limits of Imports from Economics into Competition Law," in *The Global Limits of Competition Law*, ed. D. Daniel Sokol and Ioannis Lianos (Stanford, Calif: Stanford Law Books, 2012), 34–35 (identifying several approaches for a competition law system to accommodate economic thinking while upholding legal certainty).

120 Witt, *More Economic Approach*, 261, 296 (introducing the central concern for "the compatibility of the Commission's new approach with the case law of the European Court of Justice" and the shortcomings of this approach).

121 Kovacic, "Modern Evolution of U.S. Competition Policy," 381 (attributing the stability of the US federal merger policy in the 1980s and 1990s to the "durable intellectual and institutional foundations").

122 Sokol, "Antitrust, Institutions, and Merger Control," 1104.

123 In the same vein, it could also be said that, reversely, antitrust decision-making is a fundamental aspect of institutional analyses. On this point, see ibid., 1101.

society.[124] Since these two conditions change and interact, the law application in its nature is dynamic.[125] In that regard, two questions arise:

(1) On what path is the law developing?
(2) What impact factors contribute to the law development?

Regarding the first question, there is a spectrum of answers. The two ends of that spectrum are two opposite views: One is function-determinist, arguing that all laws, as long as they serve the same functions or have the same teleology, evolve towards the same ideal template.[126] The other one is context-based, suggesting that there is more contingency and individuality regarding the path of each law's development.[127]

The law on abuse of dominance is somewhere in between. On the one hand, rationalized and sustained by contemporary economic theories, the law on abuse of dominance of a particular jurisdiction incorporates (or ought to incorporate) some universal values that transcend jurisdictional boundaries.[128] This underpins the global proliferation of competition laws and prompts the need of convergence, especially on the substantive part.[129] On the other hand, a law on abuse of dominance would most definitely have its individuality in light of the jurisdiction it operates in. This individuality is primarily reflected on the regime-specific legal objectives. Therefore, it would be ignorant to say that there exists a "one size fits all" solution for all jurisdictions without the need to consider their respective contexts (such as the stage of economic development),[130] and naive to say that policy agendas and political influences play no part in the law application.[131]

124 Glenn Morgan and Sigrid Quack, "Law as a Governing Institution," in *The Oxford Handbook of Comparative Institutional Analysis*, ed. Glenn Morgan et al., Oxford Handbooks (Oxford, United Kingdom: Oxford University Press, 2010), 277.

125 Ibid.

126 Scholars supporting this view include *Maine*, *Durkheim*, *Marx* and *Engels*, and *John Commons*. Ibid., 279–280.

127 Scholars holding this view include *Weber* and *Eugen Ehrlich*. Ibid., 281–282.

128 Ezrachi, "Sponge," 59–60 (highlighting the benchmark role played by economic thinking in various competition law regimes).

129 Eleanor M. Fox and Michael J. Trebilcock, "Introduction," in *The Design of Competition Law Institutions*, ed. Eleanor M Fox and Michael J Trebilcock (Oxford: Oxford University Press, 2012), 2, 45–46 (pointing out the global convergence of substantive competition laws and the reasons behind it).

130 Umut Aydin and Tim Büthe, "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits," *Law and Contemporary Problems* 79, no. 4 (2016): 15–26 (describing the obstacles and challenges for successful application of competition law in developing countries).

131 For some illustrations on the political dynamics in some of the most prominent competition law jurisdictions, see generally, William E. Kovacic, "Politics and Partisanship in U.S. Federal Antitrust Enforcement," *Antitrust Law Journal* 79, no. 2 (2014): 687–711; Angela Huyue Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," *Cornell International Law Journal* 47, no. 3 (2014): 671–708; Ezrachi, "Sponge."

In that light, the path of the law development can be measured up against two criteria: horizontal coherence and vertical consistency. The first criterion responds to the need of convergence in a global context, meaning that the law on abuse of dominance of a jurisdiction would be expected to retain a certain degree of conformity with the neutral and universally applicable legal objectives and economic theories.[132] This points primarily to the convergence of substantive law, but procedural and institutional convergences are also relevant.[133] In that case, comparing the EU and Chinese regimes could be useful. The second criterion derives from the requirements of accountability and legitimacy in administrative law.[134] Pursuing this vertical consistency would advise a study on competition law institutions to center-stage all the elements influencing the "continuity and cumulative nature" of the law enforcement, and to renounce the oversimplified focus on staff appointments.[135] In that sense, analyzing the existing theories of harm could be a contributing effort to verifying this vertical consistency.

This brings us to the second question of what contributes to the law development. In that regard, institutional structure and dynamics are indisputably an impact factor, as they contextualize and effectuate the logical process for deducing legal texts.[136] Discussing the institutional structure and dynamics entails the focus on the ways "by which each part of the interconnected institutional system works together smoothly".[137] Accordingly, multiple topics could be formulated in this discussion, including but not limited to the capability of the institutional actors (such as the enforcement agencies and the courts) in carrying out their enforcement responsibilities, and the role of institutional interest in those actors' respective decision-making.[138]

In light of the above, this dissertation adopts an institutional perspective to analyze how the substantive outcomes of the law enforcement are shaped by the "agency-court" institutional structure and dynamics.

132 Kent Roach, "What's New and Old about the Legal Process Review Article," *University of Toronto Law Journal* 47 (1997): 373 (introducing the concepts of horizontal coherence and vertical coherence, and referring to the former as the consistency with "contemporary materials and values").

133 Fox and Trebilcock, "Introduction," 2–4 (describing the importance and the global trend of procedures and process norms converging).

134 Ibid., 1.

135 Kovacic, "Modern Evolution of U.S. Competition Policy," 381, 394 (criticizing the pendulum narrative for understanding the US antitrust evolution and introducing the concept of constrained continuity).

136 William N. Eskridge and Philip P. Frickey, "The Making of 'The Legal Process,'" *Harvard Law Review* 107, no. 8 (1994): 2043, 2045, 2053, doi:10.2307/1341767 (suggesting that a substantive law is applied, interpreted and changed in a complex institutional process instead of a simple deduction of legal text, and therefore the law application should be subject to the requirements of due process and reasoned elaboration).

137 Eskridge and Frickey, "The Making of 'The Legal Process,'" 2044–45.

138 Roach, "What's New and Old about the Legal Process," 386, 390.

2.2 The Structurally Induced Institutional Dynamics

2.2.1 The Meaning of "Institution"

"Institution" is a broad term that could accommodate a wide range of conceptions. As Clague (1997) stated,

> [Institutions] can be organizations or sets of rules within organizations. They can be markets or particular rules about the way a market operates. They can refer to the set of property rights and rules governing exchanges in a society… They may include cultural norms of behavior. The rules can be either formally written down and enforced by government officials or unwritten and informally sanctioned.[139]

In institutional economics, "organizations" generally refer to economic outcome producers, such as firms, networks, and markets, and "institutions" generally refer to the sets of rules within organizations, such as training systems, legal systems, political systems, educational systems.[140] For example, North (1994) in his Noble Prize lecture defined institutions as "the humanly devised constraints that structure human interaction".[141] In his view, institutions are designed to achieve efficient outcomes for those with the power to make rules.[142] As he stated,

> [Institutions] are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics. Together they define the incentive structure of societies and specifically economies.[143]

Pursuant to that definition, "institutions" in the context of competition law could be understood flexibly. As Crane (2011) stated at the beginning of his book that studies the institutions of the US antitrust regime, "In economic theory, the category 'institution' is so capacious as to include virtually everything that a law student would study in an antitrust course", and a broad economic definition could "cover the entire spectrum of substantive legal norms, procedural rules, and informal mechanisms that comprise the antitrust enterprise".[144] Meanwhile, from a legal point of view, a narrower definition would simply

139 Christopher Clague, "The New Institutional Economics and Economic Development," in *Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries*, ed. Christopher Clague (Johns Hopkins University Press, 1997), 18.

140 Glenn Morgan et al., "Introduction," in Glenn Morgan et al., *The Oxford Handbook of Comparative Institutional Analysis*, 3.

141 Douglass C. North, "Economic Performance Through Time," *The American Economic Review* 84, no. 3 (1994): 360.

142 Ibid., 360–61.

143 Ibid., 360.

144 Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011), xii, https://doi.org/10.1093/acprof:oso/9780195372656.001.0001.

be "formally established governmental bodies".[145] Eventually, Crane adopted a definition of "institution" that includes both formally and informally established norms that contribute to (and also those that exert countervailing forces to) the application of substantive antitrust norms.[146] Therefore, he distinguished antitrust institutions from substantive antitrust rules, as well as from procedural ones.[147]

This dissertation adopts a definition of "institution" that builds upon the one by Crane. Since the subject is the impact of institutional dynamics on the production of theories of harm, this dissertation construes the "institutions" of a legal regime as including the following two sets of components:

- Administrative agencies that are entrusted with the public enforcement responsibilities;
- Courts that have the competence to adjudicate private suits concerning restrictions of competition, and the ones that have the judicial competence to supervise the public enforcement by the administrative agencies.

2.2.2 The Interdependence of the Institutional Actors and Their Equilibration

The two sets of institutional actors are interrelated, in the sense that they are in a constant process of equilibration.[148] As Kovacic (2012) put it, "[A]justments in one element of the antitrust system can be accentuated or offset by changes in another element".[149] The concept of equilibration was originally brought to antitrust law by Calkin (1986), who suggested that, as changes occur in a legal system, "the equilibrium position will depend both on the initial action and on the legal system's reaction".[150] Focusing on the treble-damage remedy in US antitrust law, he showed how this perceivably harsh standard of liability generated the courts' resistance to impose sanctions and consequently pulled back the reach of antitrust law in the private enforcement sphere.[151]

The idea of institutional interdependence and equilibration is rooted in antitrust institutionalism studies, whose starting point is the relatively high level of confidence in

145 Ibid.

146 Ibid., xii–xiii.

147 Daniel A. Crane, "A Neo-Chicago Perspective on Antitrust Institutions," *Antitrust Law Journal* 78, no. 1 (2012): 49.

148 Sokol, "Antitrust, Institutions, and Merger Control," 1055 (drawing an analogy between antitrust institutions and animals in an ecosystem).

149 William E. Kovacic, "The Institutions of Antitrust Law: How Structure Shapes Substance," *Michigan Law Review* 110, no. 6 (2012): 1026.

150 Stephen Calkins, "Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System," *Georgetown Law Journal* 74 (1986): 1066 (demonstrating, under the premise that the law "in the books" will be mitigated when put into action by legal actors, the struggle of the US courts to calibrate the imposition of legal liabilities and the institutional restrictions on their freedom to do so both outside and inside antitrust law).

151 Ibid., 1083.

state intervention as a supplementary to the invisible hand of the market.[152] It is under that premise that the impact of institutional settings on substantive law becomes relevant, and the study of the composing elements becomes necessary.

2.3 The Enforcement Agencies

2.3.1 The Conferral of Missions and Responsibilities

The agencies are the first and foremost force in shaping the enforcement outcomes. The key issue lies in the fact that an agency could exploit its discretionary power to realize its best interest.[153] Such exploitation takes place in an agency's process of carrying out its entrusted responsibilities of enforcing the law. Two points are worth discussing in that regard.

2.3.1.1 The Choice of Establishing a New Agency or Entrusting an Existing Agency for Enforcement

The responsibilities of public enforcement could be assigned either to a new establishment, or to an existing institution within the executive branch.[154] Consequently, either the entrusted agency would have a single mandate, or it would need to accommodate the antitrust responsibilities into a multi-folded mandate portfolio. In the case of the former, the agency is likely to be more independent and therefore has a more solid basis for developing a technocratic style of enforcement;[155] it is also believed to be better at guaranteeing committed and consistent enforcement.[156] In the case of the latter, the agency is expected to be more susceptible to policy influences and external constraints, such as those from its higher executive commanders.[157]

The contrast between singular and multiple mandates are exemplified in the US antitrust institutional structure, where the Antitrust Division of the Department of Justice (DOJ) (an agency in the executive branch) and the Federal Trade Commission (FTC) (an independent administrative agency) share most of the enforcement responsibilities.[158] It was observed

152 Crane, "A Neo-Chicago Perspective on Antitrust Institutions," 48–49.

153 Michael S. McFalls, "Institutional Design and Federal Antitrust Enforcement Agencies: Renovation or Revolution?," *Competition Policy International* 10, no. 1 (2014): 161.

154 Crane, "A Neo-Chicago Perspective on Antitrust Institutions," 56 (describing this choice as a vector of institutional design).

155 Daniel A. Crane, "Technocracy and Antitrust," *Texas Law Review* 86, no. 6 (2008): 1181 (describing the bargain where antitrust enforcers trade political salience for independence, and thereby building the basis for agency technocracy).

156 Sokol, "Antitrust, Institutions, and Merger Control," 1074–75 (describing the benefits of having an independent agency).

157 Maurice E. Stucke, "Does the Rule of Reason Violate the Rule of Law," *U.C. Davis Law Review* 42 (2009): 1448–50 (providing the example of how the Antitrust Division of the Department of Justice was used by the Nixon government for political ends in the US antitrust history).

158 Joseph P. Bauer, "Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?," *Loyola Consumer Law Review* 16, no. 4 (2004): 305–06.

that, in the field of merger control where the two agencies have overlapping authority, the FTC tended to be more aggressive in preserving competition while the DOJ was more laissez-faire.[159] This differs from the situations of the EU competition law regime and the Chinese Anti-Monopoly Law (AML) regime, where the DG Comp of the European Commission and the Chinese enforcement agencies[160] are respectively set within the existing executive branch.

2.3.1.2 Agency Discretionary Power

When a specific agency is designated to implement the law, the key question is how much discretionary power, namely the degree of autonomy, should be conferred to that agency.[161] The answer to that question depends first on how specific the substance of the law is: For different levels of specification, the legislators giving content to the law could choose between "rules" and "standards".[162] "Rules" refer to the type of legislation that specifies the solution to a societal problem and leaves only the room for the determination of facts, whereas "standards" are the type of legislation that gives only a general instruction and delegates the formation of solutions to particular institutions because the legislature is not sure how to proceed with a societal problem.[163]

Besides the level of specification of the law, another determinant of the scope of discretion is the clarity of the legal objectives, which the enforcers are expected to honor. Clearly explained objectives help align the enforcement focus in terms of both setting priorities and handling particular cases; meanwhile, broad and vague objectives create opportunities for enforcer discretion.[164] It was observed that a considerable margin of agency discretion is necessary for the enforcement of antitrust law because of the law's vague and flexible mandates.[165] One crucial aspect of such agency discretion is prosecutorial discretion, which

159 Rachel E. Barkow and Peter W. Huber, "A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers Antitrust in the Information Age," *University of Chicago Legal Forum* 2000 (2000): 81–82.

160 The enforcement responsibilities of the AML used to be shared by three agencies, but since March 21, 2018, these three agencies have been merged into one agency named "the State Administration for Market Regulation". For more descriptions on this, see Section 2.1.2 of Chapter 4 of this dissertation.

161 D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press, 1990), 8–9, https://doi.org/10.1093/acprof:oso/9780198256526.001.0001.

162 Eskridge and Frickey, "The Making of 'The Legal Process,'" 2044. For an economic costs-based discussion on the choice between rules and standards, see generally, Louis Kaplow, "Rules versus Standards: An Economic Analysis," *Duke Law Journal* 42, no. 3 (1992): 557–629, https://doi.org/10.2307/1372840.

163 Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge: [publisher not identified], 1958), 155–58. See also, Franziska Weber, "European Integration Assessed in the Light of the 'Rules vs. Standards Debate,'" *European Journal of Law and Economics* 35, no. 2 (2013): 189–191, https://doi.org/10.1007/s10657-011-9259-2 (describing the difference between a rule and a standard in terms of their respective level of precision and the different stages at which the costs—for giving content to the law—incur).

164 Fox and Trebilcock, "Introduction," 7.

165 Albert A. Foer, "The Politics of Antitrust in the United States: Public Choice and Public Choices," *University of Pittsburgh Law Review* 62, no. 3 (2001): 477.

enables an enforcement agency to prioritize the kinds of infringements to pursue and to determine the degrees of sanction.[166]

Discretionary power, as a form of autonomy, is under the premise of rational decision-making.[167] It entails that an agency has the freedom and authority to make certain decisions, and suggests that those decisions are to be received with deference by other institutions.[168] In that sense, to execute discretionary power means to rein it, both internally and externally.

Internally, the execution of discretionary power is guided by an agency's self-imposed norms. Such norms refer to the "customs or standards that members of a group develop voluntarily and apply to themselves", which function as a guide map for the agency on how to use discretionary power and are an essential component of the law development.[169] These norms evolve on the bases of experimentation, ex post self-evaluation, and changes in institutional design.[170] In that sense, one could argue that the theories of harm produced by an agency are also part of such norms that generate self-restraining effects.

There are also external mechanisms to ensure that the agencies fulfill their entrusted responsibilities. One crucial external mechanism is judicial supervision,[171] whereby the competent courts could check the legality of an enforcement agency's decisions. This mechanism creates, to a certain extent, an opposition of stance between the courts and the enforcement agencies, and in that regard it raises concerns about the capacity of the courts in assessing complex antitrust cases.[172] Another important external mechanism is congressional control, or other forms of control by democratically elected bodies.[173]

166 In the EU competition law regime, it was observed that the Commission enjoys a wide scope of prosecutorial discretion. See Wouter P. J. Wils, "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement," *World Competition* 34, no. 3 (2011): 354, 357–64.

167 Galligan, *Discretionary Powers*, 7.

168 Ibid., 8–9, 12–13; Wils, "Discretion and Prioritisation," 356 ("The authority will only have discretion to the extent that the courts that have the power to review the authority's decisions give deference to the authority's interpretations of the vague rules or standards").

169 Kovacic, "Modern Evolution of U.S. Competition Policy," 395 (introducing the concept of norms and how enforcement norms evolve in the US antitrust regime).

170 Ibid., 400.

171 See generally, Martin Shapiro, *Who Guards the Guardians?: Judicial Control of Administration* (Athens Ga.: University of Georgia Press, 1988). See also, Rachel E. Barkow, "Overseeing Agency Enforcement (Foreword)," *George Washington Law Review* 84, no. 5 (2016): 1167 (describing a US judicial ruling that elaborated the justifications for judicial supervision on administrative actions).

172 Michael R. Baye and Joshua D. Wright, "Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals," *The Journal of Law & Economics* 54, no. 1 (2011): 20, https://doi.org/10.1086/652305 (observing that economic complexity does impact the courts' ability to assess antitrust cases, and suggesting that more drastic institutional changes should be made to improve the situation).

173 Matthew C. Stephenson, "Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts," *Harvard Law Review* 119, no. 4 (2006): 1042–45 (discussing several factors that influence the legislators' preference between delegating powers to agencies and to courts, and describing the relevant mechanisms of control). See also, Barkow, "Overseeing Agency Enforcement," 1170–80 (prescribing the steps that should be taken to reinforce political oversight).

However, there are doubts as to whether populist control would be compatible with the technocratic nature of antitrust enforcement.[174]

2.3.2 Ideological Mindset

The agencies are expected to be equipped with a high level of expertise for assuming the public enforcement responsibilities.[175] Such expertise pertains primarily to substantive issues, such as the identification of competitive harm in individual cases.[176] Because of the open texture of the law, the agencies need to make intensive analytical efforts regarding both the findings of fact as well as the application of legal standards. Those analytical efforts would inevitably require the agencies' knowledge on antitrust economics (such as the antitrust schools of thought mentioned in Section 1.3).[177] In the same vein, the courts may also exhibit a tendency of following certain economic schools of thought.[178] For example, it was observed that there were alternative influences from both the Chicago School and the Harvard School on the US federal antitrust agencies,[179] and that the Chicago School prevailed in the US Supreme Court, while the Harvard School occasionally rose to dominance.[180] Of course, these observed "ideological mindsets" of the institutions are comprised of the political and economic preferences of the individuals inside those institutions.[181]

Notably, an ideological mindset is not a premeditated design choice like the entrusted mandates; it is a confluence of the ways of legal and economic thinking. In that sense, it is inclusive and progressing,[182] and the more diverse the staff's backgrounds are, the less rigid the mindset would be.[183] Accordingly, such a mindset is something to be fleshed out by looking at the actual decisions and judgments.[184] Moreover, different ideological mindsets do not necessarily result in different stances on a specific issue. For example, it

174 Crane, "Technocracy and Antitrust," 1162, 1181.

175 Crane, "A Neo-Chicago Perspective on Antitrust Institutions," 61.

176 Flynn, "Antitrust Jurisprudence," 1183, 1187–88 (suggesting that the ideological mindsets of antitrust decision-makers have a wide range of substantive implications, from the balancing of different objectives at a fundamental level to the perception of facts at a more superficial level).

177 Daniel A. Crane, "Chicago, Post-Chicago, and Neo-Chicago (Reviewing How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust by Robert Pitofsky)," *The University of Chicago Law Review* 76, no. 4 (2009): 1912. See also, Kovacic, "Modern Evolution of U.S. Competition Policy," 401.

178 William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review* 1, no. 1 (2007): 14–15 (suggesting that the US courts have been fundamentally influenced by the Chicago/Harvard double helix).

179 Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1912.

180 Ibid., 1918–20.

181 Kovacic, "Modern Evolution of U.S. Competition Policy," 394.

182 McFalls, "Institutional Design and Federal Antitrust Enforcement Agencies," 162; ibid., 401.

183 Quack, "Legal Professionals and Transnational Law-Making," 645–46.

184 For examples of such a quest in the US antitrust law context, see generally, Einer R. Elhauge, "Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?," *Competition Policy International* 3, no. 2 (2007): 59–77; Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct."

was observed that although the Chicago School and the Harvard School disagree with each other on many issues, they share a common distrust on non-court antitrust institutions.[185] Lastly, the level of independence of an institution affects the strength of its mindset. The more independence an institution has, the more possibly and consistently it will uphold its ideological beliefs. This helps explain why studies on ideological mindsets are mostly concerned with court judgments and legislative documents,[186] as the courts and legislative bodies generally face less institutional constraints comparing to the enforcement agencies.

A basic way to distinguish different ideological mindsets is to examine their respective level of confidence in the market's self-correction ability. Different mindsets could be pinpointed differently on that "confidence" spectrum. More specifically, different mindsets answer differently to this question: which is more costly from an institutional standpoint, false positives (over-enforcement) or false negatives (under-enforcement)?[187] This question is discussed in Section 1.3.5 of this chapter, where a law and economics perspective is adopted to describe the basic rationality of antitrust decision-making.

2.4 The Courts

2.4.1 Supervising Public Enforcement

2.4.1.1 The Basis of Judicial Supervision on Administrative Actions

The separation of powers is the first and foremost basis for judicial supervision on the public enforcement of the law. Designated to enforce the law, an administrative agency holds a certain amount of discretionary power that is conferred by the legislators and is stipulated in the law.[188] In that event, an enforcement agency as the executor is subordinate to and functionally separated from the legislature.[189] Therefore, that agency's exertions of discretionary power must adhere to the scope and conditions of conferral in order to be constitutionally justified.[190] The underlying belief is that the exertions of discretionary power need to be consistent with "political values that are considered to be sufficiently important within a community to extend to all varieties of government actions".[191] Responding to that

185 Daniel A. Crane, "linkLine's Institutional Suspicions," *Cato Supreme Court Review* 2008–2009 (2009): 123.

186 For some examples on this point, see generally Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct," (discussing the intellectual DNA of the US antitrust policy by looking at the stances of prominent scholars and judges and by looking at the jurisprudence embodied in case judgments). See also, Akman, "Searching for the Long-Lost Soul of Article 82EC," 277–94 (using the *travaux préparatoire* of the EU Treaty to demonstrate that Article 102 is not an intellectual product of ordoliberalism).

187 Sokol, "Antitrust, Institutions, and Merger Control," 1062.

188 Galligan, *Discretionary Powers*, 208 ("Whether there is a delegation of discretionary powers, and, if so, its scope, depends on the words of the statute.").

189 Ibid., 208, 228 (introducing legislative delegation as the primary source of discretionary powers and the conception of separation of powers).

190 Ibid., 221 (suggesting that the efforts to define the limits of authority has been underpinning the evolution of judicial review).

191 Ibid., 209 (pointing out the political values underlying the authoritativeness and justifiability of an agency decision).

need, the idea that institutions with different functions could check and balance against each other was formulated based on the separation of powers, and subsequently, the idea of the judiciary as the supervisor on the other branches of power began to develop in practice, mostly in US constitutional law.[192] It is pursuant to that logic that the judiciary supervises the administration for the compliance with the rules laid down by the legislature.[193]

There is still one piece missing: In a democratic regime, the legislature holds the political supremacy because it is democratically established; the administrative agencies are empowered by the legislature for law application, and therefore are accountable to it.[194] The judiciary as an institution is also created and generally empowered by the legislature.[195] In that light, the "separation of powers" doctrine alone cannot justify why the judiciary should interfere with the accountability chain between the authority-delegating legislature and the directly delegated administration.[196]

Here, another basis for judicial review becomes crucial. From a constitutional perspective, there are certain values and principles that override the delegation of discretionary power and perhaps even democracy.[197] The courts are considered to be the most suitable institution to guard those values and principles. This is a much more fundamental role entrusted upon the courts based on the separation doctrine.[198]

In that regard, there is also a limitation to the scope of judicial review: generally speaking, the courts are not supposed to scrutinize substantive issues to the end of substituting the

192 Ibid., 228–29 (explaining the doctrine of separation and the idea of checks and balances). See also, Department of Justice of the United States, *Deputy Assistant Attorney General Roger Alford Delivers Remarks at the University of Pennsylvania/UIBE Conference: Due Process in Antitrust Enforcement: China, Europe, and the United States*, Department of Justice Website, July 2, 2018, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-university (accessed November 8, 2018) ("Separation of powers has always been central to enforcing the antitrust laws in the United States.").

193 Galligan, *Discretionary Powers*, 235 (describing the two directions that courts might take when performing judicial review). See also, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA : Harvard University Press, 1980), 74 (suggesting that judicial review is fueled by "a desire to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis").

194 Galligan, *Discretionary Powers*, 233.

195 Tom Zwart, "Overseeing the Executive: Is the Legislature Reclaiming Lost Territory from the Courts?," in *Comparative Administrative Law*, ed. Susan Rose-Ackerman and Peter Lindseth (Edward Elgar Publishing, 2010), 148–49, 159–60 (viewing courts as the agents of the legislators in carrying out their supervising responsibilities).

196 Galligan, *Discretionary Powers*, 231–32, 234–35 (describing the difficulty of justifying judicial review in light of the separation of governmental functions and the parliamentary supremacy).

197 Ibid., 233, 235 ("Far from being value free, the justification for review lies in the assertion of certain values as sufficiently important to be constraints on the exercise of discretion."). See also, Ely, *Democracy and Distrust*, 88.

198 Ely, *Democracy and Distrust*, 135–36 (suggesting a process-oriented system of judicial review in which courts are constitutionally entrusted to advance distributional justice); Galligan, *Discretionary Powers*, 236 (describing the view on democracy formulated in the US constitutional law and its contribution to the development of judicial review).

discretionary choices with their own.[199] In other words, there are certain administrative actions deemed not—or at least less—suitable for adjudication,[200] because they are exertions of discretionary power.[201] This circles back to the separation of powers, which provides the basis for such a limitation.[202]

In light of the above, the supervising courts are expected to show certain levels of deference to the enforcement agencies. Such deference derives inherently from the discretionary power enjoyed by those agencies. Such discretionary power limits the reach of judicial supervision because, under the functional separation of the judiciary and the administration, certain administrative actions cannot be viewed as right or wrong, but merely subjective judgment calls that the agencies are entitled to make.[203] These judgment calls are often made in economic assessments, which abuse of dominance cases would usually involve.[204] In any event, judicial supervision, with a certain extent of deference (normally to the findings of fact), has proved to be an effective institutional setting to improve agency performance.[205]

2.4.1.2 Judicial Deference in the Trend of Agency Technocracy

As the landscape of competition law is becoming increasingly technocratic,[206] it is not surprising that disputes arise as to the extent of deference that the judiciary should give to the administration.[207] This kind of disputes can be described from two aspects. First, a development towards technocracy could outrun the generalist courts' capability in reviewing the increasingly complex and specialized competition law issues, thereby

199 Galligan, *Discretionary Powers*, 233. See also, José Carlos Laguna de Paz, "Understanding the Limits of Judicial Review in European Competition Law," *Journal of Antitrust Enforcement* 2, no. 1 (2014): 204 (describing the limits of judicial review in the context of EU competition law).

200 Galligan, *Discretionary Powers*, 241, 245–46 (presenting the view that certain issues should not be subject to adjudicative procedures because of the consideration on effectiveness, and suggesting that this is more of a quantitative measurement, as opposed to qualitative determination). See also, Zwart, "Overseeing the Executive," 150–51 (introducing the concept of non-adjudicability as a potential obstacle to judicial review on administrative actions).

201 Laguna de Paz, "Understanding the Limits of Judicial Review in European Competition Law," 214.

202 Ibid., 210.

203 Ibid., 217.

204 Marc Jaeger, "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?," *Journal of European Competition Law & Practice* 2, no. 4 (2011): 296–97, 308 (pointing out that, within the EU, the reason that discussions on judicial deference mostly appear in the context of competition law is because the Court of Justice left considerable room for discretion of the Commission regarding matters of economic assessments).

205 McFalls, "Institutional Design and Federal Antitrust Enforcement Agencies," 164 (using the US as an example to show how judicial supervision has largely improved agency performance).

206 Crane, "Technocracy and Antitrust," 1165–74 (describing the evolution of the US antitrust law from populism towards technocracy). See also, Baye and Wright, "Is Antitrust Too Complicated for Generalist Judges?," 2 (describing the increasing complexity and specialization of antitrust analyses). Jaeger, "The Standard of Review in Competition Cases Involving Complex Economic Assessments," 305–09 (illustrating the increasingly economic-featured developments in the legislative and institutional aspects of EU competition law).

207 Crane, "Technocracy and Antitrust," 1200 (explaining this tension with the example of the FTC).

resulting a de facto expansion of the discretionary scope.[208] Secondly, this development could reach a stage of redefining the institutional relationship between the courts and the agencies and making the technocratic agencies institutionally more independent from the supervising courts.[209]

Here it is important to clarify the meaning of technocracy. The notion of "technocracy" is meant to be the opposite of "populist", much like "specialist" being the opposite of "generalist". As Crane (2008) observed when studying the development of US antitrust law towards technocracy, federal antitrust enforcement "has become increasingly separated from popular politics, insulated from direct democratic pressures, delegated to industrial policy specialists, and compartmentalized as a regulatory discipline".[210] In accordance with that meaning, it should be noted that technocracy does not necessarily entail a non-interventionist policy preference. This is contrary to the debatable perception that technocracy is underpinned by a strong laissez-faire ideology.[211] Arguably, the choice between populism and technocracy and the choice among different policy preferences are two separate issues: the former is a choice of "means" whereas the latter is a choice of "end". Although it may be true that on many occasions technocracy comes with a laissez-faire ideology,[212] there is no solid basis for assuming they are always associated and therefore discrediting technocracy.

Therefore, before discussing why and to what extent supervisory courts should be deferential to technocratic agencies, we need to look at what aspects technocracy appears to be necessary and desirable. In that regard, it was argued that technocracy should prevail generally in the context of antitrust enforcement, because there is no longer any disagreement on fundamental issues that require populist inputs or explicit trade-offs

208 Cheng-Yi Huang, "Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence from Poland, Taiwan, and South Africa," in Rose-Ackerman and Lindseth, *Comparative Administrative Law*, 468 (suggesting that "the needs of political and socio-economic restructuring also prompted courts to refine their degree of control over administrative action").

209 Christian Carlson, "Antitrusting the Federal Trade Commission: Why Courts Should Defer to Federal Trade Commission Antitrust Decision Making," *DePaul Business and Commercial Law Journal* 12, no. 3 (2014): 364–67 (describing the technocratic institutional template envisaged by the US Congress in 1914 when the FTC was established). See also, Joshua D. Wright and Angela M. Diveley, "Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission," *Journal of Antitrust Enforcement* 1, no. 1 (2013): 86, https://doi.org/10.1093/jaenfo/jns007 (suggesting that under the expertise hypothesis that an administrative agency is better equipped than courts to resolve issues in which it specializes, Congress is likely to vest the agency with administrative adjudicatory power); Crane, "Technocracy and Antitrust," 1190–91 (suggesting that, to a certain extent, technocracy is in conflict with the mode of adjudication).

210 Crane, "Technocracy and Antitrust," 1160.

211 Harry First and Spencer Weber Waller, "The Goals of Antitrust," *Fordham Law Review* 81 (2013): 2567–68 (partly basing the argument for more democracy in antitrust on this perception).

212 Ibid., 2571.

between the interests of different social classes.[213] Furthermore, it was suggested that a technocratic antitrust system is more likely to improve enforcer performance than a populist system.[214] This suggestion relies on the finding that generalist courts are often unable or unwilling to handle cases involving complex economics.[215] However, that does not necessarily mean administrative agencies guarantee superior performance.[216]

By causing the abovementioned disputes, the trend of technocracy serves as a catalyst for the shift of dynamics between the supervising courts and the supervised agencies pertaining to the issue of judicial deference. For example, in EU competition law, there were some heated discussions about the CJEU's (particularly the General Court's) deference to the Commission's competition enforcement decisions: On the one hand, there were criticisms that the CJEU's reluctance to conduct vigorous reviews, coupled with the formalistic and out-of-touch legal standards, insulated the Commission decisions from judicial scrutiny.[217] Alongside, there were also concerns that, as the increasingly large fines border on criminal penalties, the CJEU's disproportionately deferential attitude could be understood as a waiver of the unlimited jurisdiction of review, and therefore could impede the right to a fair trial as provided in Art 6(1) of the ECHR.[218] On the other hand, there were defenses that the General Court's allegedly low standard of review on the Commission's competition decisions involving complex economic assessments should be explained as a conscious choice for respecting the Commission's margin of discretion, as opposed to a negligence in carrying out the supervisory responsibility;[219] therefore, the judicial deference is said to be perfectly in line with the normative framework, and is an indication of effective judicial review.[220]

213 Crane, "Technocracy and Antitrust," 1211–14 (introducing the peculiarities of antitrust in the present context). See also, Flynn, "Antitrust Jurisprudence," 1189 (pointing out when inputs from various sources are needed and when they are not: "Certainty will prevail where there is a multiplicity of value choices expressed (horizontal price fixing); uncertainty will prevail where there are conflicts between the values perceived and the wisdom of the choices made (vertical market restraints).").

214 Crane, "Technocracy and Antitrust," 1216–19 (defending technocracy's performance advantages).

215 Carlson, "Antitrusting the Federal Trade Commission," 370–72 (showing that some of the US courts used procedural devices to avoid handling complex antitrust cases). See also, Baye and Wright, "Is Antitrust Too Complicated for Generalist Judges?," 20 (finding that basic economic training could be helpful to judges in simple antitrust cases, but not so much in complex economic cases).

216 Wright and Diveley, "Do Expert Agencies Outperform Generalist Judges?," 103 (concluding that there is no evidence proving the performance superiority of the FTC than generalist judges).

217 Damien Geradin and Nicolas Petit, "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment," Discussion Paper, TILEC Discussion Paper (Tilburg Law and Economics Center, October 26, 2010), 34–35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342 (accessed November 8, 2018).

218 Alexander Arabadjiev, "Unlimited Jurisdiction: What Does It Mean Today?," in *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, ed. Allan Rosas, Nils Wahl, and Pascal Cardonnel (Oxford: Hart Publishing, 2012), 216.

219 Jaeger, "The Standard of Review in Competition Cases Involving Complex Economic Assessments," 300–03.

220 Ibid., 313.

To sum up at this point, the relationship between an enforcement agency and its supervising courts is essentially about the balancing between the agency's discretionary power and the legitimacy control over that agency. In that regard, although the rising trend of technocracy adds some variants to the "agency-court" institutional dynamics, it does not change that essence. Therefore, in the context of antitrust technocracy, the most relevant question is not how much deference should be given, but whether such technocratic expertise has been translating into better agency performance.[221] If the answer is no, the subsequent question would be what factors are hindering that translation. Only by answering these questions first, could we conclude whether the relationship between antitrust agencies and courts should be redefined. A useful parameter for assessing an agency's performance (and also that of a court) is the quality of the theories of harm it produces in individual cases. Useful criteria for evaluating that quality include a case decision's internal consistency of logic and the degree to which it makes economic sense. The case analyses in Chapters 5 and 6 generally adopt these criteria.

2.4.2 Adjudicating Private Enforcement

Besides supervising antitrust agencies, the judiciary also takes on the responsibility of adjudicating civil litigations. Private enforcement in the form of civil litigations is installed in most competition law regimes, but its significance varies across jurisdictions. For example, it was observed that, in the US, the ratio between private and public antitrust cases "stabilized in the 10–1 range" after the 1970s.[222] Meanwhile in the EU regime, the quantity of private enforcement cases has been limited, despite the recent efforts to promote it.[223]

By rewarding damages to the anticompetitively injured parties, private enforcement provides the primary function of achieving corrective or restorative justice.[224] Along the way, it also provides the function of deterrence, supplementing public enforcement.[225]

221 Wright and Diveley, "Do Expert Agencies Outperform Generalist Judges?," 103.

222 Crane, *The Institutional Structure of Antitrust Enforcement*, 54. It should be noted here that in the US context, because the FTC and the Antitrust Division of the DOJ have to go to courts for enforcement that is not merger control, "government litigation" counts as public enforcement, just like "private litigation" counts as private enforcement.

223 Niamh Dunne, "The Role of Private Enforcement within EU Competition Law," *Cambridge Yearbook of European Legal Studies* 16 (2014): 149, https://doi.org/10.1017/S1528887000002585. See also, David J. Gerber, "Private Enforcement of Competition Law: A Comparative Perspective," in *The Enforcement of Competition Law in Europe*, ed. Thomas M.J. Möllers and Andreas Heinemann (Cambridge: Cambridge University Press, 2007), 442.

224 Wouter P. J. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," *World Competition* 32, no. 1 (2009): 5 (describing three different objectives underpinning the antitrust enforcement in the EU). See also, Assimakis P Komninos, "The Relationsihp between Public and Private Enforcement: Quod Dei Deo, Quod Caesaris Caesari," in *European Competition Law Annual 2011: Integrating Public and Private Enforcement - Implications for Courts and Agencies*, ed. Philip Lowe and Mel Marquis (Oxford: Hart Publishing, 2014), 141–42.

225 Crane, *The Institutional Structure of Antitrust Enforcement*, 164. See also, Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 8 (arguing that private enforcement also contributes to deterrence, but in that regard it is inferior to public enforcement).

There are primarily two kinds of private enforcement: follow-on actions and stand-alone actions. The former refers to private litigations in which the claims are based on effectively rendered public enforcement decisions, and the latter refers to private litigations on their own initiative.[226]

Although it is debatable whether private enforcement is solely driven by private interest, it is certain that private interest is the main driving force.[227] This should not raise any alarms, since private interest does not necessarily contradict public interest. Instead, private interest presumably enhances public interest, which overarches a competition law regime,[228] by fulfilling the restorative function that is less suited for public enforcement.[229] Admittedly, it is yet to be verified as to what extent private interest actually enhances public interest in specific contexts, since not every private party whose interest was impaired by anticompetitive conduct would resort to private enforcement. Nonetheless, a dual-track system that incorporates both private enforcement and public enforcement would appear desirable, as the two tracks undertake different tasks that a competition law regime is supposed to perform simultaneously.[230]

However, such a dual-track setting becomes complicated when the development of substantive law is taken into account: Private enforcement is a track parallel to public enforcement; that parallelism entails the scenario where the same judicial system that supervises public enforcement agencies also interprets and applies the same set of substantive rules in the private enforcement sphere.[231] This scenario enables civil litigations to also contribute to the substantive law development alongside administrative enforcement. In that light, one could ask the question whether—and if yes how—the judicial system distinguishes its double roles in the dual-track system. This question could be furthered as to what extent the courts' jurisprudence in private enforcement cases differs from that in public enforcement cases. In other words, it would be worth examining whether, in a dual-track setting, the judiciary's double institutional roles induce discrepant its theory of harm production. The examination could be done by, for example, comparing the theories of harm produced by functionally different courts in similar case circumstances.

226 Tim Reuter, "Private Antitrust Enforcement and the Role of Harmed Parties in Public Enforcement," *European Journal of Law and Economics* 41, no. 3 (2016): 484, https://doi.org/10.1007/s10657-015-9495-y.

227 Komninos, "The Relationsihp between Public and Private Enforcement," 143–44; Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 6.

228 Komninos, "The Relationsihp between Public and Private Enforcement," 144.

229 Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 12; Komninos, "The Relationsihp between Public and Private Enforcement," 141.

230 For a brief analysis and literature review on how public enforcement and private enforcement exert mutual influence, see Abraham L Wickelgren, "Issues in Antitrust Enforcement," in *Research Handbook on the Economics of Antitrust Law*, ed. Einer Elhauge (Cheltenham, UK: Edward Elgar Publishing, 2012), 269, https://doi.org/10.4337/9780857938091.

231 Gerber, "Private Enforcement of Competition Law," 438 (describing the judicial context where private enforcement interacts with public enforcement).

These questions matter because there is a risk that the substantive rules could be interpreted and developed incoherently.[232] This risk is especially real if one takes into account the question whether judges deciding private cases should also weigh on the public interest at stake.[233] Admittedly, the clarification of substantive rules is never intended to be the primary function of private enforcement,[234] and in regimes that are dominated by public enforcement (such as the EU regime), the judicial system's double roles may not result in that much discrepancy after all. But in regimes where the judicial system's role as the adjudicator of civil litigations outweighs its role as the supervisor of public enforcement (such as the Chinese regime), the risk of incoherent substantive law application becomes very real. One approach to assess this risk is to use the concept of theory of harm as a vantage point for comparing the jurisprudence of the agencies and that of the courts. The following chapters of this dissertation follow that approach. As a start, the next chapter describes the legal framework and institutional structure of the EU regime.

232 Ibid., 440 (envisaging the possible consequences if private enforcement played a major role in clarifying substantive law).

233 Komninos, "The Relationsihp between Public and Private Enforcement," 143.

234 Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 5–6.

THE LEGAL FRAMEWORK AND INSTITUTIONAL STRUCTURE UNDER ARTICLE 102 TFEU

Table of Contents

1 The EU Competition Law Framework

1.1 Treaty Provisions on Competition

Since the foundation of the European Coal and Steel Community, the primary legal source has been the founding Treaties drafted by the acceded and acceding Member States governments. The current Treaty underpinning the EU is the Treaty of Lisbon, which is comprised of the Treaty on the European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU").[1] They are equally binding and have been effective since December 1, 2009. The responsibility of ensuring uniform interpretations of these Treaties is entrusted upon the Court of Justice of the European Union ("CJEU").

The founding Treaties preceding the Treaty of Lisbon always reserved a provision under Art 3 to proclaim the importance of competition as an essential means to achieve the objective of establishing a common market.[2] This was changed in the Treaty of Lisbon: instead of stipulating competition in Art 3 of the TEU along with several other activities and responsibilities as intermediaries for achieving the internal market objective, the Treaty of Lisbon adopted a Protocol 27 to address the role of competition in the internal market. Presumably, this change does not undermine the role of competition as an intermediary objective for achieving the goal of an internal market, since the Protocols and the normal Treaty provisions are of equal binding force.[3]

Overall, the Treaty provisions on competition have remained unchanged since the EEC Treaty was signed in 1958.[4] The Treaty provisions underpinning the EU competition law regime are Articles 101–09 of the TFEU. Articles 101–06 regulate conduct of undertakings while Articles 107–09 regulate state aid:

- Art 101 lays down the principles and conditions for regulating agreements between undertakings, decisions by associations and concerted practices that could be considered incompatible with the internal market;
- Art 102 lays down the principles and conditions for regulating abusive conduct by one or more undertakings of a dominant position that could be considered incompatible with the internal market;

1 Consolidated version of the Treaty of European Union, [October 26, 2012] OJ C 326, 13–390 (hereinafter, "the TEU"); Consolidated version of the Treaty on the Functioning of the European Union, [October 26, 2012] OJ C 326, 47–390 (hereinafter, "the TFEU").

2 That was the case from the Treaty of Rome to the Treaty of Nice. See Art 3(f) of Treaty establishing the European Economic Community, effective on January 1, 1958 (hereinafter, "the Treaty of Rome" or "the EEC Treaty"); Art 3(1)(g) of Treaty establishing the European Community (Consolidated version 2002), [2002] OJ C 325, 33–184 (hereinafter, "the Treaty of Nice" or "the EC Treaty").

3 This can be inferred from Art 51 of the TEU, which states that the "Protocols and Annexes to the Treaties shall form an integral part thereof".

4 Loannis Lianos and Arianna Andreangeli, "The European Union: The Competition Law System and the Union's Norms," in *The Design of Competition Law Institutions: Global Norms, Local Choices*, ed. Eleanor M Fox and Michael J Trebilcock (Oxford: Oxford University Press, 2012), 384.

- Art 103 confers secondary legislative competence on the Council; it also lays down certain substantive requirements on those secondary legal instruments adopted by the Council;
- Art 104 stipulates the legislative and enforcement competence of the Member States in the absence of a secondary legislative act adopted by the Council;
- Art 105 confers on the Commission the power to enforce Articles 101 and 102, as well as the legislative power supplementary to the Council;
- Art 106 lays down the principles for regulating public undertakings and undertakings that have functions relating to general economic interest;
- Art 107 stipulates the conditions for prohibiting state aids that distort or threaten to distort competition, as well as the conditions for clearing state aids that are compatible with the internal market;
- Art 108 lays down the responsibilities of the Commission and the Member States in regulating state aids, as well as the Council's role in clearing a particular state aid;
- Art 109 confers on the Council the secondary legislative power to apply Articles 107 and 108, particularly Art 108(3).

Other Treaty provisions that help clarify the role of competition law in the EU legal system include:

- Art 3(1)(b) of the TFEU, which stipulates the Union's exclusive competence (in relation to the Member State governments) in establishing competition rules necessary for the functioning of the internal market;
- Protocol No 27 of the TFEU, which emphasizes undistorted competition as an integral part of the internal market and stipulates the Union's responsibility to take actions necessary to achieve it.
- Art 3(3) of the TEU, which lays down the mandate of establishing an internal market.

1.2 Secondary Legislation

1.2.1 The Types of Legal Instrument and the Institutional Actors at Play

According to Art 288 of the TFEU, the types of legal instruments available for concretizing the Treaty provisions include the following:

- *Regulations*. They shall be binding in their entirety and directly applicable in all Member States. Therefore, competition rules adopted in the form of Regulations will not only be applied by the Commission, but also by the national competition authorities ("NCAs") and national courts;
- *Directives*. They shall be binding as to the result to be achieved, but it is up to the authorities of each addressed Member State to choose the legislative form and methods;

- *Decisions*. They shall be binding in their entirety. According to Art 288, there are two types of Decisions, depending on whether they have specific addressees. If a Decision specifies to whom it is addressed, it shall be binding only on them; if not, it shall be binding in general;
- *Recommendations* and *opinions*. They do not have binding effects. Instruments under this category are often referred to as soft law. In practice, the scope of soft law is not limited to documents titled as "Recommendation" and "Opinion"; it also includes "Notices" and "Guidelines".

As the political organ representing the Member States, the Council is empowered by the Treaties to legislate. Art 103(1) of the TFEU stipulates that, based on proposals from the Commission and after consulting the European Parliament, the Council shall adopt regulations or directives to give effect to the principles set out in Articles 101 and 102.

Three things should be noted about the Council's legislative power in the area of competition law. First, it follows the special legislative procedure: according to Art 103(1), the European Parliament is to be consulted in a legislative process concerning matters of competition, instead of being a co-legislator with the Council as in an ordinary legislative procedure.[5] Therefore, the Council is and will continue to be the sole legislator in the area of competition law, unless the European Council unanimously activates the general passerelle clause provided in Art 48(7) of the TEU. Secondly, the types of legal instruments that the Council can adopt include regulations and directives, both of which have binding effects across the Union. Thirdly, as provided in Art 3(1)(b) of the TFEU, competition rulemaking falls within the exclusive competence of the Union. In that event and according to Art 2(1) of the TFEU, the Member States share no legislative power regarding matters of competition in the internal market, unless authorized by the Council; they are to implement the legal instruments adopted by the Council.

The Commission is another essential institution in the Union's competition rulemaking. First, according to Art 103(1) of the TFEU, it holds the power to *initiate* a procedure of competition legislation, while the Council holds the power to *adopt* a legislative act on competition. In other words, the Council cannot adopt any legislative act on competition without a proposal from the Commission. In that light, it could be said that the Commission plays a crucial role in formulating competition rules. Secondly, the Council can delegate the Commission to adopt certain legislative acts, as provided in Art 290 of the TFEU. For example, according to

5 Most of the legislative acts on competition do not require the signature of the European Parliament. However, as provided in Articles 42 and 43(2) of the TFEU, the European Parliament is a co-legislator in the area of agriculture and fisheries. As of November 9, 2018, the European Parliament and the Council have jointly adopted one competition-related Regulation in this area: Regulation 1308/2013. See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [December 20, 2013] OJ L 347, 671–854.

Art 105(3) of the TFEU, the Commission "may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b)". Thirdly, by adopting individual decisions that are reviewable by the CJEU in annulment proceedings, the Commission contributes to the CJEU's lawmaking in the form of case precedents. On that account, Chapter 5 of this dissertation selects and analyzes a number of annulment cases.

1.2.2 Secondary Legislation Laying down Articles 101 and 102 TFEU

The very first piece of secondary legislation on competition was Council Regulation 17, which was adopted in 1962 to implement Articles 85 and 86 of the EEC Treaty (now Articles 101 and 102 of the TFEU).[6] This Regulation established a centralized enforcement system of competition law.

In 2003, the Council replaced Regulation 17/62 with Regulation 1/2003, which is now the cornerstone of the legal regime under Articles 101 and 102 of the TFEU.[7] Regulation 1/2003 launched a modernization reform of EU competition law. This reform can be described from two aspects. The first one is the revision of substantive rules. The changes made include, *inter alia*, the availability of leniency (Art 19 of Regulation 1/2003) and the increased amount of applicable fine (Art 23). The second aspect is the decentralization of the enforcement system: Regulation 1/2003, supplemented by Commission Regulation 773/2004 and a number of Commission Notices and Guidelines, abolished the old centralized system established by Regulation 17.

The Council also adopted new substantive rules governing particular sectors. For example, Regulation 411/2004 replaced Regulation 3975/87 and 3976/87 applying to air transport. Regulation 1419/2006 replaced Regulation 4056/86 applying to maritime transport. Regulation 169/2009 replaced Regulation 1017/68 applying to transport by rail, road and inland waterway (with the exception of Art 13(3) of Regulation 1017/68).

According to Articles 290 and 291 of the TFEU, the Commission can adopt delegated acts and implementation acts. In practice, delegated acts have been used by the Commission to enrich the substantive law while implementation acts have been used to construct the enforcement system.

To implement Art 101(3), the Council issued several Regulations, delegating the legislative power to the Commission to adopt "block" exemption Regulations ("BERs") that are

6 EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, [February 21, 1962] OJ 13, 204–11 (English special edition: Series I Volume 1959–1962, 87–93) (hereinafter, "Regulation 17").

7 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [January 4, 2003] OJ L 1, 1–25.

applicable to certain categories of agreements.[8] The Council also adopted several BERs regarding special sectors.[9]

Regarding the implementation acts, so far the most prominent one is Commission Regulation 773/2004, which lays down the main procedural rules concerning the application of Articles 101 and 102. Two later Commission Regulations amended Regulation 773/2004: Commission Regulation 622/2008 (concerning settlement procedures in cartel cases) and Commission Regulation 519/2013 (an adaptation for the accession of Croatia into the EU).

Directives are of general applicability too, but they give the Member States certain discretion on implementation, in the sense that the Member States are allowed to adopt the forms of rules that are in line with their domestic contexts. Most of the directives are concerned with particular sectors and industries. Directives as a type of legal instrument are mainly used to establish institutional framework or to harmonize substantive rules.[10]

A Decision will have general binding effects if it does not have specific addressees. In practice, Decisions of this kind are often used to enhance the institutional system or to clarify specific law-application issues.

1.2.3 Secondary Legislation Laying down the Merger Control System

The EEC Treaty did not have any provisions on merger control. It was suggested that the absence of merger control was because some Member States had the concern that a cross-Europe merger control system would lead to over-regulation of domestic industries.[11] For that reason, subsequent Treaties, including the most recent Treaty of Lisbon, did not incorporate any provisions merger control either. The lack of Treaty provisions on merger control led to the Commission's attempt to invoke Art 86 of the EEC Treaty (on abuse of dominance) to control mergers in the *Continental Can* case.

It was not until the adoption of Council Regulation 4064/89 in 1989 that a merger control system was established. In 2004, the Council replaced Regulation 4064/89 with Regulation 139/2004. Supplemented by an implementation Regulation 802/2004 and a number of

8 For a list of BERs adopted by the Commission, see the Commission website: http://ec.europa.eu/competition/antitrust/legislation/legislation.html (accessed November 9, 2018).

9 For example, Council Regulation 19/65 (amended by Regulation 1215/99 and Regulation 1/2003), Regulation 2821/71 (amended by Regulation 2743/72 and Regulation 1/2003), and Regulation 487/2009 (repealing Regulation 3976/87), which are applicable to the air transport sector; Regulation 1534/91, which is applicable to the insurance sector (amended by Regulation 1/2003); Regulation 246/2009, which is applicable to liner shipping companies (repealing Regulation 479/92).

10 For a more thorough list of Directives and Decisions within the scope of EU competition law, see Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, 5th ed. (Oxford, United Kingdom; New York, NY: Oxford University Press, 2014), xxxviii–xxx.

11 Jones and Sufrin, *EU Competition Law*, 1134–35.

Commission Notices, this new Council Regulation modified the review standard from the "dominance" test to a "significant impediment to effective competition" test.[12]

1.3 Soft Law

As a concept opposite to "hard law", soft law could be understood as rules that do not have legally binding force but have the aim and consequence of producing a certain level of legal effect in practice.[13] It carries out the function of clarifying secondary legislation.

The legitimacy of soft law stems from the Treaties and the general principles of EU law. According to Art 288 of the TFEU, recommendations and opinions, as forms of soft law, can be adopted for exercising the Union's competences. However, they have no binding force. This means that soft law cannot be the legal basis of a Commission decision, nor can a soft law document derogate from the existing statutory laws or the case law.

Having no binding force does not necessarily mean having no legal effects. As established by the CJEU in its case law, whenever a soft law document is adopted and published by the Commission, it becomes binding upon the Commission itself. Such effects derive from the principle of legitimate expectations, along with five other Community law principles.[14] Nonetheless, such effects could be derogated if explanations compatible with the principle of equal treatment were given.[15]

In that light, soft law is an integral component of the substantive EU competition law. Its importance can be described from two aspects. First, by providing guidance while remaining flexible, it reconciles to a great extent the requirement of legal certainty and the complexity of economic assessments in competition law application. Secondly, by elaborating hard law, it helps ensure a uniform application of the Union's competition rules.

However, soft law as a veritable type of legal instrument may also raise concerns. For example, it could be used as a "back-door" for legislation, thus undermining legislative democracy.[16] Also, it may be short on procedural legitimacy, in the sense that the rulemaking process of soft law features inadequate participation and interest representation from the relevant

12 Art 2(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24, 1–22.

13 Linda Senden, *Soft Law in European Community Law* (Oxford: Hart, 2004), 104.

14 Case T-23/99, *LR AF 1998 v Commission* [2002] ECR II 1705, para 245; Case T-31/99, *ABB Asea Brown Boveri v Commission* [2002] ECR II 1881, para 258; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission* [2005] ECR I 5425, paras 82 and 88.

15 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission* [2005] ECR I 5425, para 290.

16 Imelda Maher and Oana Stefan, "Competition Law in Europe: The Challenge of a Network Constitution," in *The Regulatory State: Constitutional Implications*, ed. Dawn Oliver, Tony Prosser, and Richard Rawlings (Oxford University Press, 2010), 194.

stakeholders, including the European Parliament, the Member State governments, and the private parties.[17]

In practice, the Commission is the only producer of soft law on competition. The Commission's soft law appears in various forms, ranging from the commonly seen notices and guidelines to the less commonly seen comfort letters, communications and recommendations.[18] Soft law clarifies, with flexibility, the open texts in Treaty provisions and secondary legislative acts, and therefore provides more—albeit generic—guidance on the law. In that sense, it sometimes serves as an indicator of potential policy directions.

1.4 Rulings of the CJEU

1.4.1 A Hierarchy between the General Court and the CJEU rulings

Art 19 of the TEU stipulates that the CJEU consists of the Court of Justice ("ECJ"), the General Court ("GC", formerly named as the Court of First Instance—"CFI"), and specialized courts.[19] According to Art 256 of the TFEU and Art 58 of the Statute of the CJEU, the main jurisdictional difference between the GC and the ECJ is that the GC reviews points of both law and facts while the ECJ as the supreme judicial authority reviews only points of law.[20] Rulings of the GC on points of law are reviewable by the ECJ and therefore could be quashed by the ECJ.[21]

The ECJ's review of a GC judgment is initiated by an appeal brought by a Member State, an EU institution or, inter alia, a party of direct concern.[22] The grounds for the ECJ's intervention include a lack of competence of the GC, a breach of the appellant's procedural rights, and

17 Herwig C.H. Hofmann, "Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy," *Common Market Law Review* 43, no. 1 (2006): 171–73.

18 Oana Andreea Stefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?," *European Law Journal* 14, no. 6 (2008): 755.

19 There used to be one specialized court: the Civil Service Tribunal. However, on December 3, 2015, the Council adopted a regulation reforming the GC. Part of that reform is the merging of the Civil Service Tribunal with the GC. This entailed the transfer of seven judge posts from the Civil Service Tribunal to the GC in September 2016. See Council of the European Union, *Court of Justice of the EU: Council adopts reform of General Court*, December 3, 2015, https://www.consilium.europa.eu/en/press/press-releases/2015/12/03/eu-court-of-justice-general-court-reform/ (accessed November 9, 2018).

20 Protocol on the Statute of the Court of Justice of the European Union, [2016] OJ C 203, 72–95 (hereinafter, "the CJEU Statute").

21 The following types of GC judgments could be reexamined by the ECJ, according to Art 256 of the TFEU: (1) judgments on first instance cases brought to the GC, (2) appeals against decisions of the specialized courts, and (3) preliminary rulings for questions submitted by Member State courts. The second type is not relevant to competition law. The third type is not relevant either but for a different reason: Theoretically speaking, the GC has the power to give preliminary ruling, as provided in Art 256(3) of the TFEU: "The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute." But the Statute never laid down any of such specific areas. Therefore, in reality it has always been the ECJ who handles all the preliminary ruling cases.

22 Art 56 of the CJEU Statute.

an infringement of Union law by the GC.[23] The outcome of the ECJ's review is either a GC judgment being quashed or being upheld. If the ECJ decides to quash a GC judgment, it could either give a final judgment to replace that judgment, or refer the case back to the GC for a retrial.[24] If the case were referred back to the GC, the GC would be bound by the ECJ's rulings on points of law.

1.4.2 The Effects of the CJEU Judgments

The effects of the CJEU judgments (including annulment case judgments and preliminary rulings) can be described from two aspects:

(1) Their binding effects as individual judgments, and
(2) Their effects as case law precedents.

Each CJEU judgment is binding in its entirety upon its addressees. This binding effect derives from the CJEU's role as the Union's judiciary, who hears cases involving not only private parties but also the Commission and the Member States. First, the CJEU hears cases brought by natural or legal persons that are of direct concern with an act or a regulatory act adopted by EU institutions.[25] In such proceedings, the CJEU has the power to review the legality of the acts adopted by EU institutions. Secondly, the CJEU supervises the Commission regarding the interpretation and application of the Union law.[26] Thirdly, the CJEU also supervises, by making preliminary rulings, the Member States regarding their application of EU law.[27] In sum, in the current EU legal framework, every GC judgment (unless being referred back to the GC or being re-adjudicated by the ECJ) and every ECJ judgment should be treated as the ultimately authoritative interpretation of an existing EU rule in a particular factual context, and therefore they must be followed by the addressees and the relevant parties of the judgment at hand.

Strictly speaking, the judgments by the CJEU are not binding upon future cases. The reasons are as follows. First, there is no written rule stating that the GC and the ECJ are bound respectively by their own precedents, nor there is a rule stating that the precedents established by the ECJ bind the GC. In that regard, there are only two exceptions: (1) when the ECJ quashes a GC judgment and refers it back to the GC, the GC will be bound by the quash decision of the ECJ on points of law,[28] and (2) when the ECJ finds a case falling with the GC's jurisdiction, it should refer the case in question back to the GC, who will then be bound by the ECJ's ruling on jurisdiction.[29] Secondly, the ECJ's preliminary rulings are not

23 Ibid., Art 58.
24 Ibid., Art 61.
25 Art 19(3)(c) of the TEU; Art 263 of the TFEU.
26 Articles 17(1) and 19(1) of the TEU.
27 Art 267 of the TFEU.
28 Art 61 of the CJEU Statute.
29 Ibid., Art 54.

binding on future cases either. A qualified court of the Member States is allowed to ask questions on any issue, even if a particular issue has already been addressed by the ECJ in its previous rulings.[30] Besides, the ECJ is not restricted from making, over time, more than one reference on the same issue.[31]

However, judgments of the CJEU do have certain degrees of legal effects as precedents. For preliminary rulings, their effects as precedents are referred to in Art 99 of the Rules of Procedure of the Court of Justice.[32] This rule states that, where a preliminary question is identical to a question on which the Court has already ruled, or where the answer to such a question could be clearly deducted from existing case law, the Court is allowed to give its reply by reasoned order. For annulment case judgments, their veritable legal effects stem from the CJEU's self-restraints: in an effort to promote legal certainty, the CJEU is inclined to follow its previously delivered judgments unless the circumstances of the case at hand have changed or the relevant precedent appears to be wrongly decided.[33]

2 The Institutional Structure at the Union Level

2.1 The Commission: The Supranational Center of the Enforcement System

2.1.1 Responsibilities and Composition

The general responsibilities of the Commission as an EU institution include budget execution, program management as well as other coordination, execution and management tasks laid down in the Treaties. Externally, it represents the EU, except in the area of common foreign and security policy and other cases provided for in the Treaties. In the area of competition law, its responsibilities can be described from two aspects:

(1) Participating in competition legislation, and
(2) Acting as the public enforcer of the Union's competition law.

As described in Section 1.2.1 of this chapter, the Commission is instrumental in formulating competition rules, because it is the only competent institution that can submit a legislative proposal and because it can adopt delegated acts.

The Commission also assumes the responsibility of public enforcement of EU competition law at the Union-level. It is entrusted with an extensive range of powers to carry out this responsibility. In the area of competition law where the EU has exclusive competence (in relation to the Member State governments), the Commission is accountable to the Council

30 Anthony Arnull, "Owning up to Fallibility: Precedent and the Court of Justice," *Common Market Law Review* 30, no. 2 (1993): 248.

31 Ibid., 249.

32 Rules of Procedure of the Court of Justice, [2012] OJ L 265, 1–42.

33 Arnull, "Owning up to Fallibility, " 251–52.

and the European Parliament, and at the same time it is subject to the judicial review of the CJEU in individual enforcement cases. Known as "the guardian of the Treaties", the Commission ensures the adherence of the Member States to the Treaties. For this task, Art 258 of the TFEU empowers the Commission to initiate infringement procedures against the Member States.

The Commission has twenty-eight Commissioners, one from each Member State. Aside from the President of the Commission and six Vice-Presidents, each of the remaining twenty-one Commissioners has one or more portfolios.[34] Since November 2014, the Commissioner chairing competition has been Margrethe Vestager from Denmark.

The Commission is administratively divided into a number of Directorate-Generals ("DGs") that preside over different policy areas. Each DG has a Director General as the leader. The DG dealing with competition is DG Comp, whose predecessor was DG IV until 1999. The Director General of DG Comp, assisted by three Deputy Director Generals and one Chief Economist, has been Johannes Laitenberger since September 1, 2015. Although the Commission delegates its competition law responsibilities to DG Comp, decisions are made on behalf of the Commission as a whole.

The general decision-making process of DG Comp in terms of competition law enforcement can be described as follows. First, DG Comp opens an investigation or files a proceeding based on a notification by the addressees, a complaint from relevant parties, or its own initiative.[35] Subsequently, a case team will be established to handle the case. If requested, a hearing will be held before a Hearing Officer, who acts independently from the DG Comp and reports only to the Commissioner for Competition, to clear out procedural issues, particularly the ones that might endanger the defendant's right of defense. The case team is responsible for producing the first draft of the decision. After the first draft is formulated, it will be sent to the Legal Service of DG Comp and the Advisory Committees for legal proofreading and peer review. After this, the Director General will present the draft decision to the Commissioner for Competition, who will further present the draft decision to the college of Commissioners, who will decide the adoption of this decision on the basis of the principle of collective responsibility.[36]

34 For those portfolios, see European Commission, *Political Leadership*, European Commission Website, https://ec.europa.eu/info/about-european-commission/organisational-structure/political-leadership_en (accessed November 9, 2018).

35 The specific procedural rules governing the public enforcement by the Commission are stipulated in Regulation 1/2003, Regulation 773/2004, and a number of Commission Notices.

36 See note 34 above.

2.1.2 The Decentralization Reform and the Central Role of the Commission

The Commission has been playing a vital role in enforcing the Union's competition law since the adoption of Regulation 17 in 1962. Regulation 17 established a centralized system in which the Commission had the exclusive power to grant exemptions (to allegedly anticompetitive agreements between undertakings) under Art 85(3) of the former EEC Treaty. The main objective of that centralization was to promote market integration and to foster a "competition culture" within the European Community.[37] Regulation 17 made substantial progress in achieving that objective in its four decades of implementation. However, with the continuing expansion of the European Community, new challenges arose, including the increasingly overwhelming caseload of the Commission. To address these new challenges, a reform was brought to the agenda in the 1990s by the Council, leading to the adoption of Regulation 1/2003, which entailed a decentralization reform of the EU competition law enforcement regime.[38]

This decentralization reform brought about two main changes. The first one was the diffusion of the Commission's exclusive power to exempt anticompetitive agreements under Art 85(3) of the EEC Treaty.[39] Intended to relieve the Commission's overwhelming caseload, this reform abolished the central notification system that had granted the Commission the exclusive power to exempt anticompetitive agreements, and empowered the NCAs and national courts of the Member States to fully apply the Treaty provisions that is now Articles 101 and 102 of the TFEU. For example, now the NCAs, acting on their own initiative or based on a complaint, have the power to conduct investigations, to adopt decisions, to prescribe penalties, and to grant exemptions.[40] National courts also have the power to apply Articles 101 and 102 when performing their judicial review functions.[41] According to Art 35 of Regulation 1/2003, the Member States shall establish competition authorities (or other authorities that fulfill the requirements), but they have the discretion to choose which institutions to be designated as NCAs. Therefore, it is possible for a Member State to have multiple NCAs sharing the enforcement power.

The second change was the transition from an *ex ante* enforcement approach to an *ex post* one. Under Regulation 17, parties of an agreement, decision or practice that could be caught by Art 85(1) of the Treaty must notify the Commission for an exemption. Until the Commission made a decision of exemption or negative clearance, that agreement, decision or practice should be presumed void.[42] In that event, the legality of an agreement

37 Nicholas Moussis, *Access to the European Union: Law, Economics, Policies*, 20th ed. (Cambridge: Intersentia, 2013), 394.

38 Eleanor M. Fox, "Antitrust and Institutions: Design and Change," *Loyola University Chicago Law Journal* 41 (2010): 477.

39 This Treaty provision later became Art 81(3) of the EC Treaty, and is now Art 101(3) of the TFEU.

40 Articles 5 and 22 of Regulation 1/2003.

41 Art 6 of Regulation 1/2003.

42 Articles 2 and 4 of Regulation 17.

or practice would be uncertain until the Commission explicitly granted an exemption or a negative clearance. This uncertainty was fixed by Regulation 1/2003, which, along with some BERs and the "De Minimis Notice", established a review system in which an agreement or a concerted practice would be presumptively legal, unless the Commission or the NCAs issued a decision declaring its incompatibility with Art 101(1) of the TFEU.

The decentralization reform did not significantly alter the institutional structure. Namely, although the Commission's power was formally decentralized, it actually attained significant influence on the Member States' application of EU competition law. For instance, Art 11(6) of Regulation 1/2003 provides that the initiation of proceedings by the Commission under Articles 101 and 102 shall prevail over the NCAs' competence of applying those provisions. Art 15(3) provides that the Commission may submit written or oral observations to a national court when the coherent application of Articles 101 and 102 is at stake. Admittedly, Regulation 1/2003 does provide a certain degree of institutional constraint on the Commission. For example, Art 14 of Regulation 1/2003 introduced the role of Advisory Committees: they shall act as consultants and peer-review panels for the Commission before the adoption of an enforcement decision, but their opinions are not binding upon the Commission. Currently there are two Advisory Committees: the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Concentrations. They consist of experts from the Member States.

In sum, the adoption of Regulation 1/2003 has enabled the Commission to retain, if not strengthen, its central role in enforcing the Union law under Articles 101 and 102 of the TFEU. This came with the price of delegating part of its former power to Member States agencies and courts. The Commission' central role in the decentralized regime can be described as four types of enforcement power:

- The power to investigate (laid down in Articles 17–22 of Regulation 1/2003);
- The power to make decisions (Articles 7–10);
- The power to impose sanctions (Articles 23–24);
- The power to provide supervision and guidance (Articles 11–13 and 15–16).

The Commission's central role implies that it would be able to pursue its entrusted missions and responsibilities with greater support from a Union-wide enforcement network. On the one hand, this could help progress the market integration mandate of the Union, but on the other hand, it could also result in the potential marginalization of other social and industrial goals that should have been emphasized in the Member States.[43] Also, there was

43 Stephen Wilks, "Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?," *Governance* 18, no. 3 (2005): 440.

the concern of "prosecutorial bias" of the Commission resulted from the accumulation of investigative, prosecutorial, and adjudicative powers.[44]

2.2 The CJEU as the Judicial Supervisor

2.2.1 Historical Developments

In 1958 after the Treaty of Rome (the EEC Treaty) was enacted, two new Communities, namely the European Economic Community (the "EEC") and the European Atomic Energy Community (the "EAEC"), were established. The Member States of these two Communities signed the Convention on Certain Institutions Common to the European Communities, which mandated the establishment of a single Court of Justice for the two Communities. To that end, the Court of Justice of the European Communities was established.[45] It was also to replace the Court of Justice of the European Coal and Steel Community (the "ECSC") established by the Treaty of Paris in 1951.[46]

Based on the 1986 Single European Act and by a Council decision in 1988, the CFI of the European Communities was created and attached to the Court of Justice of the European Communities, with the aims to alleviate the increasingly overwhelming caseload and to foster more judicial expertise in economic factual issues.[47] The Treaty of Maastricht, enacted in 1993, confirmed the establishment of the CFI.

At the beginning, the CFI was only allowed to hear cases concerning disputes between the Communities and their employees, certain proceedings brought by undertakings against the Commission under the ECSC Treaty, and competition cases brought by undertakings under the EEC Treaty.[48] In 1993 and 1994, the CFI's jurisdiction was expanded to including all direct actions brought by both undertakings and natural persons.[49] In 2004, the CFI's jurisdiction was further expanded to include direct actions brought by Community institutions and Member States.[50]

44 Donald Slater, Sebastien Thomas, and Denis Waelbroeck, "Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?," *European Competition Journal* 5, no. 1 (2009): 129; cf. Wouter P. J. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR," *World Competition* 33, no. 1 (2010): 5–29.

45 Anthony Arnull, *The European Union and Its Court of Justice*, 2nd ed. (Oxford: Oxford University Press, 2006), 6–7.

46 Articles 33 and 38 of the Treaty establishing the European Coal and Steel Community, signed on April 18, 1951, effective on July 23, 1952, expired on July 23, 2002 (hereinafter, "the Treaty of Paris (1951)").

47 Arnull, *The European Union and Its Court of Justice*, 25.

48 Ibid., 26.

49 Council Decision of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, [1994] OJ L 66, 29–29; Council Decision of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, [1993] OJ L 144, 21–22.

50 Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, [2004] OJ L 132, 5–6.

The Treaty of Nice (the EC Treaty), which was signed in 2001 and became effective in 2003, provided the possibility of creating subsidiary courts below the Court of Justice and the CFI to deal with special areas of law.[51] On that basis, the EU Civil Service Tribunal was established in 2004.

The Treaty of Lisbon, which was signed in 2007 and became effective in 2009, changed the names of the Courts. From then on, "the Court of Justice of the European Union" (CJEU) officially refers to the two levels of courts taken together, and the CFI was renamed as the GC.[52]

2.2.2 Mission and Competence

The CJEU is entrusted with the mission to safeguard the coherent interpretation of the Treaties. For instance, Art 19 of the TEU stipulates that the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed", and Art 17(1) of the TEU stipulates that the Commission's application of Union law shall be overseen "under the control of the CJEU". To accomplish this mission, the CJEU is empowered with two sets of competence: (1) hearing direct actions, and (2) making preliminary rulings.[53]

The CJEU mainly hears two types of direct actions:

- Infringement proceedings brought by the Commission or a Member State against Member States that fail to comply with their Treaty obligations,[54] and similarly, infringement proceedings against a Union institution for failing to act;[55]
- Annulment proceedings brought by the Member States, the Union institutions, or any natural or legal person, regarding a measure adopted by a Union institution.[56]

In making preliminary rulings, the CJEU holds the ultimate authority in interpreting EU law, including Treaty provisions and secondary acts. It also rules on the validity of secondary Union law in the light of primary law. A preliminary ruling procedure starts with a court or tribunal of the Member States submitting a question to the CJEU.[57] According to Art 267 of the TFEU, it is obligatory for a national court of last instance to make a preliminary reference to the CJEU while optional for other courts and tribunals when applying a Treaty provision or a secondary Union act.

51 Art 225a of the EC Treaty.

52 For reference purposes, this dissertation, including this Chapter, refers to the higher level of the CJEU (namely "the Court of Justice") as "the ECJ", and the lower level of the CJEU as "the CFI" or "the GC".

53 Arnull, *The European Union and Its Court of Justice*, 33.

54 Articles 258 and 259 of the TFEU.

55 Art 265 of the TFEU.

56 Art 263 of the TFEU. In the competition law field, "the Union institution" at issue would usually be the Commission.

57 Regarding the qualification of such a "court or tribunal", see Case C-24/92, *Corbiau v Administration des Contributions* [1993] ECR I 1277, para 15; Case C-54/96, *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* [1997] ECR I 4961, para 23.

2.2.3 The Institutional Hierarchy between the ECJ and the GC

With the establishment of the CFI, a hierarchy was also created between the CFI (later the GC) and the ECJ. As the CFI's jurisdiction expanded in the 1990s and 2000s, this hierarchy developed towards a two-tier judicial architecture. This was indicated in the change of expression in the EC Treaty, which removed the wording that the CFI was to be attached to the ECJ.[58]

This two-tier setting exists in the CJEU's direct-action hearings: the ECJ only reviews issues on points of law, not points of fact.[59] Therefore, the GC has final authority on factual issues of the cases brought to it, but its rulings on points of law are subject to full scrutiny by the ECJ. In that regard, any unjustified admission, rejection or prejudice of evidence by the GC may constitute an error of law.[60] A GC judgment could be entirely or partially quashed by the ECJ if the parties chose to appeal and such errors of law were found.

However, not all direct actions are within the GC's jurisdiction. According to Art 256 of the TFEU and Art 51 of the CJEU Statute, the ECJ has exclusive jurisdiction on actions between the Union institutions and actions brought by a Member State against the European Parliament and/or the Council (with three exceptions). The GC has first instance jurisdiction on all the other actions, especially actions brought by individuals or a Member State against the Commission. In the field of competition law, most of the direct actions fall in the GC's jurisdiction at first instance.

This two-tier setting does not exist in the makings of preliminary rulings, on which the ECJ enjoys exclusive jurisdiction. Although it is possible for the GC to be empowered to make preliminary rulings according to Art 256(3) of the TFEU, this has not happened yet.[61]

2.2.4 Composition and Formations

2.2.4.1 The ECJ

Currently the ECJ is composed of twenty-eight Judges (one from each Member State) and eleven Advocates General.[62] Art 253 of the TFEU stipulates the general qualifications and terms of office of these Judges and Advocates General. Art 255 of the TFEU stipulates the general selection process, including a seven-person panel selection. After all Judges are in place, a President shall be elected among the Judges, in order to represent the Court,

58 Art 220 of the EC Treaty; cf. Art 168(a) of the EEC Treaty, which was amended by Art 11 of the Single European Act.

59 Art 256(1) of the TFEU.

60 C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I 4951, paras 61 and 102.

61 See note 21 above.

62 Court of Justice, *Composition*, CVRIA, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (accessed November 9, 2018).

to direct the judicial business, and to ensure the proper functioning of the Court.[63] A Vice-Present shall also be elected to assist the President and to take the President's place when needed.[64] Among the Advocates General, the Court shall designate a First Advocate General for each period of one year.[65] In each case, the President shall designate one Judge as the Judge-Rapporteur, and the First Advocate General shall assign one Advocate General to that case.[66]

2.2.4.2 The GC

The Judges of the GC are to be selected according to the process stipulated in Art 255 of the TFEU. Their qualifications and terms of office are laid down in Art 254 of the TFEU. Unlike the ECJ, the GC does not have any Advocate General position, but in needed circumstances a Judge may be called upon to perform the functions of an Advocate General.[67] Art 48 of the CJEU Statute stipulates that, as from September 1, 2016, there shall be 47 Judges in the GC, and two Judges per Member State as from September 1, 2019. As of October 4, 2017, there are forty-six Judges in office.[68]

63 Art 9 of the Rules of Procedure of the Court of Justice (see note 32 above).

64 Ibid., Art 10.

65 Ibid., Art 14.

66 Ibid., Articles 15–16.

67 Art 49 of the CJEU Statute.

68 General Court, *Composition*, CVRIA, https://curia.europa.eu/jcms/jcms/Jo2_7033/en/ (accessed November 9, 2018).

THE LEGAL FRAMEWORK AND INSTITUTIONAL STRUCTURE OF THE CHINESE ANTI-MONOPOLY LAW

4

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1 The Legal Framework

The previous chapter shows that the EU regime is one centered by the Commission with judicial supervision from the CJEU, which consists of the ECJ and the GC. As the comparative counterpart, this chapter turns to the Chinese Anti-Monopoly Law regime.

1.1 Competition Regulation before the Anti-Monopoly Law

The Anti-Monopoly Law (AML) was adopted on August 30, 2007 and entered into force on August 1, 2008. After the Chinese central government decided to initiate the economic reform and trade opening in 1978, it adopted many laws and regulations to assist the transition from the centrally planned economy to the proclaimed socialist market economy. In the 1990s, the Chinese government became increasingly aware of the necessity of installing a law to foster and to supervise market competition. However, because of the lack of pre-existing laws in that arena, it chose a step-by-step approach: adopting fragmented rules regarding different aspects of competition regulation in a continuing process of establishing a market-oriented economy.

1.1.1 The Anti-Unfair Competition Law and the Price Law

Prior to the adoption of the AML, there were several pieces of legislation dealing with competition-related issues, including the *Anti-Unfair Competition Law (1993)*,[1] the *Price Law (1997)*,[2] the *Provisional Regulation on Mergers with and Acquisition of Domestic Enterprises by Foreign Investors (2003)*. The original versions of both the Anti-Unfair Competition Law and the Price Law contained provisions that regulate monopolistic behavior and thus overlap with the AML.[3] Such overlapping provisions in the Anti-Unfair Competition Law were dealt with in the revision in 2017,[4] but those in the Price Law are yet to be revised.

Until the revision in 2017, the Anti-Unfair Competition Law had overlaps with the AML regarding the following types of infringements: abuse of dominant position by public undertakings, abuse of administrative power by governmental departments, undocumented loyalty rebates, pricing below costs in the aim of excluding competitors,

1 The Anti-Unfair Competition Law of the People's Republic of China (《中华人民共和国反不正当竞争法》), adopted by the Standing Committee of the National People's Congress on September 2, 1993, effective on December 1, 1993, http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=6359 (accessed November 9, 2018) (hereinafter, "the Anti-Unfair Competition Law").

2 The Price Law of the People's Republic of China (《中华人民共和国价格法》), adopted by the Standing Committee of the National People's Congress on December 29, 1997, effective on May 1, 1998, http://en.pkulaw.cn/display.aspx?cgid=19158&lib=law (accessed November 9, 2018) (hereinafter, "the Price Law").

3 Xingyu Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime: The Inevitable Overstepping of Authority and the Implications," *Journal of Antitrust Enforcement* 6, no. 1 (April 1, 2018): 126–27.

4 For the 2017 revised version, see http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=304262 (registration required for full access) (accessed November 9, 2018).

bundling, and collusive tendering.[5] The Price Law also has overlaps with the AML, most notably regarding the practice of price-fixing agreements.[6] It was observed that the Price Law was repeatedly applied to price-fixing agreements after the AML became effective.[7]

1.1.2 The Concepts of "Anti-Monopoly" and "Anti-Unfair Competition"

In the context of Chinese law, the concept of "anti-monopoly" is connected with but at the same time separate from the concept of "anti-unfair competition". They are connected because, prior to the AML, many issues that are now covered by the AML were dealt with under the Anti-Unfair Competition Law by the same enforcement agency (the SAIC). They are normatively separate because, after the AML, the Anti-Unfair Competition Law remains effective in parallel. In that light, it is important to distinguish the meanings of these two concepts. On that point, the Ministry of Commerce ("MOFCOM") provided an official clarification.[8] Supposedly, there are mainly three aspects of difference:

(1) *The origin of jurisprudence*. The jurisprudence of the Anti-Unfair Competition Law derives from the morality of business. This law judges whether a business practice is morally condemnable—namely unfair—and therefore should be legally sanctioned. Meanwhile, the jurisprudence of the AML stems from the consideration of social welfare. Accordingly, the AML prohibits a practice on the ground of impeding the maximization of social welfare, irrespective of the moral acceptability of that practice.

(2) *The legal interests that they protect*. The Anti-Unfair Competition Law protects the lawful interests of competitors and consumers impaired by unfair competition practices. In that sense, it is within the sphere of private law. Meanwhile, the AML protects market competition itself, and is within the sphere of public law for its regulatory nature.

(3) *The enforcement mechanisms*. The Anti-Unfair Competition Law relies heavily on private enforcement in the forms of litigation and filing complaints before the relevant administrative authority, whereas the AML mainly depends on the proactive intervention by public authorities with the supplementation of private litigations.

5 See Articles 3(2), 6, 7, 8, 11, 12, and 15 of the Anti-Unfair Competition Law. These overlapping provisions were addressed in the 2017 revision of the Law.

6 See Art 14(1) of the Price Law.

7 Yichen Yang, "Price-Related Cartels under the Chinese Anti-Monopoly Law Regime: The Need to Clarify Four Substantive and Procedural Issues," *World Competition* 39, no. 3 (August 1, 2016): 484–85. A possible explanation for this observation is that the AML had not come into effect when these practices were carried out. See Thomas K. Cheng, "The Meaning of Restriction of Competition Under the Monopolistic Agreements Provisions of the PRC Anti-Monopoly Law," *World Competition* 40, no. 2 (2017): 341.

8 Department of Treaty and Law of the MOFCOM, *The Relationship between the Anti-Monopoly Law and the Anti-Unfair Competition Law* (反垄断法与反不正当竞争法的关系), September 1, 2005, http://tfs.mofcom.gov.cn/article/bc/200509/20050900341909.shtml (in Chinese) (accessed November 9, 2018).

In this dissertation, the term "anti-monopoly law" is used in the Chinese context as an equivalent of "competition law" that is used in the EU context. It only uses the term "anti-unfair competition law" when referring to the Chinese Anti-Unfair Competition Law, the subject of which falls outside the scope of this research.[9]

1.2 The Advent of the Anti-Monopoly Law

1.2.1 The Legislative Process

The adoption of the AML is a protracted process. The AML drafting process was launched in 1994, but it was not completed until 2007. One reason for this overdue process was the central government's doubt regarding the necessity of a competition law: it feared that the Chinese industries and enterprises might be too fragile to withstand international competition.[10] Another reason was the challenge to formulate a sensible and effective competition law without actually undermining the government's control over strategically important industries and sectors such as electricity and petroleum.[11]

In the early 2000s, the central government suddenly decided to expedite the legislative process. In 2003, the newly restructured MOFCOM was assigned to take over the task of drafting the AML. In 2004, the MOFCOM submitted the first draft to the State Council. After several rounds of revision, the State Council presented the final draft to the Standing Committee of the National People's Congress in 2006 for further review and discussion.[12] The AML was eventually adopted by the Standing Committee of the National People's Congress in 2007 and entered into force on August 1, 2008.

According to the scholars that advised the legislation, the catalyst that prompted this expedited process was China's marketization reform: around the millennium, this marketization reform was reaching to a point where widespread administrative monopolies, a legacy from the central-planning era, had become an inevitable hurdle for establishing the Chinese market economy; meanwhile, market-liberalization was also generating worrisome private monopolies at different regional levels.[13] There was also the practical reason of imminent legislator change: 2007 was the last year for the legislators to fulfill their promise to the people of establishing a "fairly comprehensive legal system" for the proclaimed socialist market economy, before the legislative power was handed over to their

9 For a closer analysis of these two concepts, see Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Cheltenham, UK: Edward Elgar, 2014), 272–85.

10 Yong Huang, "Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law," *Antitrust Law Journal* 75, no. 1 (2008): 118.

11 Bruce M. Owen, Su Sun, and Wentong Zheng, "China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond," *Antitrust Law Journal* 75, no. 1 (2008): 240.

12 Zhenguo Wu, "Perspectives on the Chinese Anti-Monopoly Law," *Antitrust Law Journal* 75, no. 1 (2008): 77–78.

13 Angela Huyue Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," *Cornell International Law Journal* 47 (2014): 703.

successors.[14] Additionally, China's entry into WTO in 2001 necessitated the adoption of a law governing market competition.[15]

After the drafting of the AML was green-lighted, there were still divergent views on how the substance of the law should be formulated. Some advised that the law should follow the US or the EU model and focuses on regulating private monopolies. Meanwhile, many others considered it imperative for the law to also address administrative monopolies, because they doubted how much strength a competition law would have in the Chinese context if it had no power to tackle administrative monopolies.[16]

1.2.2 The Text of the Anti-Monopoly Law

After many rounds of consultation, negotiation and compromise making, the text of the AML was finalized as consisting of the following parts:

- *General Principles*. This part lays down the objectives, scope of application, institutional setting,[17] and relevant legal concepts of the AML.
- *Monopolistic Agreement*. This part stipulates the types of horizontal and vertical monopolistic agreements to be prohibited, as well as the possible derogations from those prohibitions.
- *Abuse of Market Dominance*. This part stipulates the prohibited types of abusive conduct by a dominant undertaking. It also lists the relevant criteria to be considered when determining the dominance of an undertaking.
- *Concentration of Undertakings*. This part clarifies the concept of concentration of undertakings, the threshold for undertakings to file a notification to the authority, the formality requirements of notification, the timetable of the review process, the factors to be considered during the review process, and some national security considerations that could be relevant for the review process.
- *Abuse of Administrative Power to Exclude or Restrict Competition*. This part prohibits administrative agencies and organizations that are legally obligated to carry out public administrative functions from using their power to engage in anticompetitive activities, such as compulsory designation of supply, setting up territorial barriers, bid manipulation, and discrimination against certain undertakings.

14 Huang, "Pursuing the Second Best," 119.

15 When applying for the WTO membership, the Chinese representatives unequivocally assured the WTO that "China was now formulating the law on Anti-Monopoly". See the WTO, *Report of the Working Party on the Accession of China* (October 1, 2001), 12, http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/CHN49.doc (accessed November 9, 2018). In the WTO accession agreement, the WTO also required China to adopt positive measures to "allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated". See the WTO, *Accession of the People's Republic of China* (November 23, 2001), 6, http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc (accessed November 9, 2018).

16 Wu, "Perspectives on the Chinese Anti-Monopoly Law," 77, 93–94.

17 Following the legislative custom of the People's Republic of China, the AML did not specify the authorities responsible for enforcing the law. Instead, it entrusted the State Council to set up the enforcement agencies (as stipulated in Art 10 of the AML) and the Anti-Monopoly Commission (Art 9 of the AML).

- *Investigation of Monopolistic Behavior*. This part lays down the procedural rules for anti-monopoly investigation, including the measures that can be adopted during an investigation, the obligations of investigating officers, the rights of the undertakings under investigation, the rights of third parties with relevant interests, and the possibility of suspending or terminating the investigation after accepting the undertaking's interim commitments.
- *Legal Liabilities*. This part stipulates the range of fines and other punishments applicable to undertakings that have committed monopolistic agreements, to dominant undertakings that have committed abusive conduct, and to undertakings that have carried out concentrations without clearance. This part also introduces the applicable civil liabilities, administrative liabilities and criminal liabilities, as well as the right to administrative appeal and the right to administrative litigation for the abovementioned undertakings. Administrative remedies and punishments are applied to administrative agencies or quasi- administrative organizations that have infringed the law. Administrative punishments and criminal liabilities are applicable to enforcement officials that have failed to fulfill their obligations stipulated in the law.
- *By-law*. It states the law's inapplicability to legitimate usage of IP rights and to agricultural coordination. It also states the effective date of the law.

To assist the AML application, the public enforcement agencies have adopted several implementation regulations for the past decade. These implementation regulations are introduced in Section 2 of this chapter.

2 The Institutional Structure for Public Enforcement

2.1 The (Bygone) Tripartite Regime

2.1.1 Three Candidates for the Enforcement Agency Position

The AML text made only two references to the institutional design. First, it delegated the State Council to appoint the AML enforcement agencies before the AML came into force.[18] It did so instead of specifying the enforcement agencies in the text. Notably, this has been a legislative custom in the People's Republic of China: The legislature normally does not specify any enforcement agency that the law at hand requires; instead, it delegates this task to the State Council. Before a law enters into force, the State Council would issue one or more "Three-Designation Orders", a kind of internal document that stipulates each enforcement agency's main responsibilities, internal organization structure, and staff composition.[19] Secondly, it mandated the State Council to establish an Anti-Monopoly Commission, whose main responsibility is to coordinate the activities of the enforcement agencies.[20]

18 Art 10 of the AML.

19 Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 127.

20 Art 9 of the AML.

Before the AML, there were three central agencies involved in competition-related regulation: the MOFCOM, the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC). Since the administration at that time promised not to create any new agencies,[21] it was speculated that the State Council would simply assign the enforcement responsibilities to one of these three agencies.

The three agencies were motivated to be the enforcer of the AML. The power to regulate competition would significantly enhance the institutional roles of these three agencies in the central government, since the market-related regulations would only become more important on the road to a more market-oriented economy. Against the background that the internal structure of the State Council is characterized by technocracy and the technocratic officials' promotions depend heavily on their accumulation of administrative merits ("zhengji"),[22] it is no surprise that all the three candidate agencies wanted this power. With this power, these agencies would not only be able to enhance their pre-existing non-antitrust responsibilities and missions,[23] they would also be able to disobediently pursue ends and strategies that are outside the scope of their mandates.[24] Thus the three agencies engaged in a "race" to be positioned as the AML enforcement agency.

The outcome of this race was a tripartite enforcement system. Namely, the three institutions ended up sharing the power to enforce the AML, similar to the situation before the AML:

- The MOFCOM was entrusted with the responsibility to review concentrations of undertakings;
- The NDRC was responsible for regulating price-related anticompetitive agreements and abuse of dominant position;
- The SAIC was responsible for regulating non-price-related anticompetitive agreements and abuse of dominant position.[25]

21 Huang, "Pursuing the Second Best," 126.

22 Victor C. Shih, *Factions and Finance in China: Elite Conflict and Inflation* (Cambridge: Cambridge University Press, 2007), 5, 54 (explaining that, compared with leaders of generalist fractions, leaders of narrow technocratic fractions in the central government face more difficulties to make "a bid for overall control, which usually requires broad-base support" within the Chinese Communist Party; thus, they are more concerned with enhancing the institutional roles of the technocratic fractions they are in. By doing so, they are able to maximize their power through "promoting members of the factions and enlarging resources available to agencies controlled by faction members"; consequently, they are able to advance their political careers according to the "administrative merits" system.).

23 Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," 693–94.

24 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York: Cambridge University Press, 2008), 59 (discussing the "principal-agent" problem, where an agency delegated with certain responsibilities could become disobedient or slack by exploiting the informational advantage it has over its delegating principal).

25 Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 124.

2.1.2 The Decision to Consolidate the Three Agencies

This tripartite system was kept in place for almost a decade until March 2018. On March 13, 2018, the State Council proposed to the National People's Congress a government-restructuring plan, part of which was to merge the three AML enforcement agencies. More specifically, the plan was to replace the SAIC with a new agency named "the State Administration for Market Regulation" (SAMR), and to reallocate the AML responsibilities of the MOFCOM and the NDRC to the SAMR.[26] In addition to the AML responsibilities, the SAMR would also absorb the responsibilities of the State Administration for Quality Supervision and Inspection and Quarantine and the State Food and Drug Administration.[27] On March 17, 2018, the National People's Congress approved this restructuring plan. On March 21, 2018, the SAMR was formally established, thus ending the tripartite era.

Nonetheless, it would probably take quite some time for the restructuring to be truly settled. Pursuant to the standard agency-establishment procedure, the State Council disclosed the Three-Designation Order for the SAMR on August 10, 2018.[28] This Three-Designation Order was put into implementation on July 30, 2018. Many details are still being sorted out, including the reallocation of staff from the NDRC and the MOFCOM, and the transferring of the on-going cases of the two agencies. Additionally, the SAMR may also need to codify the implementation regulations adopted in the tripartite era. Therefore, even if it were just for ensuring an effective restructuring and nothing more, the study of the bygone tripartite regime would still be relevant.

The remaining parts of this section describe the main actors in the tripartite regime, with a focus on how the three enforcement agencies landed their respective positions in the AML regime and their enforcement records thereafter.

2.2 The Anti-Monopoly Commission

Art 9 of the AML stipulates that the State Council shall set up the Anti-Monopoly Commission (AMC) that is responsible for organizing, coordinating and guiding anti-monopoly work. More specifically, it shall undertake the following duties:

- Studying and drafting policies on competition;
- Conducting investigations and assessments of market competition and publishing assessment reports;

26 Adrian Emch, *China to Merge Antitrust Authorities*, Kluwer Competition Law Blog, March 21, 2018, http://competitionlawblog.kluwercompetitionlaw.com/2018/03/21/china-merge-antitrust-authorities/ (accessed November 10, 2018).

27 Xing Bingyin, *The Government Restructuring Plan: To Establish the State Administration for Market Regulation and No Longer Maintaining the SAIC* (机构改革方案: 组建国家市场监督管理总局, 不再保留工商总局), The Paper, March 13, 2018, https://www.thepaper.cn/newsDetail_forward_2026804 (in Chinese) (accessed November 10, 2018).

28 Wang Jun, *The Three-Designation Order for the SAMR Disclosed: Appointing 1 Director and 4 Vice-Directors* (国家市场监管总局三定方案出炉：设局长1名，副局长4名), The Paper, August 13, 2018, https://www.thepaper.cn/newsDetail_forward_2342433 (in Chinese) (accessed November 10, 2018).

- Formulating and releasing anti-monopoly guidelines;
- Coordinating the administrative enforcement of the AML;
- Other duties as prescribed by the State Council.

The AMC was established quickly. In July 2008, at the eve of the AML's entering into force, the State Council issued a Notice concerning the staff composition and main responsibilities of the AMC.[29] According to the Notice, the board of the AMC shall consist of nineteen commissioners. Among them, there should be one of the vice prime ministers of the State Council, the minister of the MOFCOM, the director of the NDRC, the director of the SAIC, and the deputy secretary general of the State Council; the other fourteen commissioners are comprised of three deputy directors respectively from the NDRC, the SAIC and the MOFCOM, and eleven deputy directors from eleven other ministries and ministerial-level agencies. In 2009, though not formally announced, the total number of ministries involved expanded to sixteen, with the accession of the People's Bank of China and the National Bureau of Statistics.[30] Additionally, an expert panel was also formed in December 2011 to provide advisory opinions for policy making. This expert panel consists of twenty-one lawyers, economist and technology experts, who work only part-time in the AMC. The part-time nature of these expert positions creates an opportunity for lobbying and therefore the risk of regulatory capture, as demonstrated by the bribery scandal of an ex-panelist.[31]

As a consultative and coordinating body, the AMC is supposed to carry out its responsibilities only through inter-ministerial meetings.[32] It was suggested that the setting up of the AMC was the legislators' last-ditch effort to ensure a consistent and consolidated enforcement regime against the fragmented pre-AML rules and the inevitability of having more than one enforcement agency.[33]

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29 The State Council, *Notice of the General Office of the State Council on the Main Functions and Members of the Anti-Monopoly Commission of the State Council* (《国务院办公厅关于国务院反垄断委员会主要职责和组成人员的通知国办发[2008]104 号》), July 28, 2008, http://www.lawinfochina.com/display.aspx?lib=law&id=7190&CGid= (accessed November 10, 2018).

30 See the list of signatures in the Notice concerning the adoption of the Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market (国务院反垄断委员会关于印发《关于相关市场界定的指南》的通知), July 6, 2009, http://www.lawinfochina.com/display.aspx?lib=law&id=7575&CGid= (accessed November 10, 2018).

31 Tang Ming and Liu Nan, *Anti-Monopoly Expert Being Discharged Suddenly: What Is the Expert Panel in the Anti-Monopoly Commission?* (反垄断专家突遭解聘:反垄断委员会专家咨询组到底是个啥), August 13, 2014, http://finance.cnr.cn/gs/201408/t20140813_516216117.shtml (in Chinese) (accessed November 10, 2018).

32 Normally, a consulting and coordinating agency within the State Council has no power to take administrative actions. See Art 6 of the Regulations on the Administration of the Establishment and Staffing of the Administrative Agencies of the State Council (《国务院行政机构设置和编制管理条例》), adopted by the State Council on August 3, 1997, effective on August 3, 1997, http://www.lawinfochina.com/display.aspx?lib=law&id=14544&CGid= (accessed November 10, 2018).

33 Qian Hao, "The Multiple Hands: Institutional Dynamics of China's Competition Regime," in *China's Anti-Monopoly Law: The First Five Years*, ed. Adrian Emch and David Stallibrass (Alphen aan den Rijn: Wolters Kluwer International, 2013), 22.

The AMC's daily work was handled by the MOFCOM.[34] So far its activities have remained almost invisible to the public. Its most notable work was the issuing of the Guidelines on the Definition of the Relevant Markets in 2009.[35] Due to the lack of visibility, it is difficult to say whether the AMC has effectively fulfilled its responsibilities for the past decade.

According to the 2018 restructuring plan, the AMC is to be absorbed by the new SAMR. The SAMR is yet to disclose any information regarding the reallocation of the AMC.

2.3 The MOFCOM

Merger control, which was the MOFCOM's responsibility, falls outside the research scope of this dissertation. Nonetheless, the MOFCOM is an integral part of the tripartite regime. For that, this subsection introduces the MOFCOM.

2.3.1 The Multiplicity of Missions

According to the State Council's Three-Designation Order pertaining to the MOFCOM, the latter should establish an Anti-Monopoly Bureau that is responsible for conducting anti-monopoly review of concentrations between undertakings, guiding Chinese undertaking's responses to anti-monopoly proceedings overseas, and engaging in multilateral and bilateral competition-policy dialogues and cooperation.[36]

The MOFCOM as a ministry was entrusted with multiple responsibilities, including but not limited to merger control. For example, one of its most important responsibilities is to represent China in bilateral and multilateral negotiations of trade agreements and to promote and regulate international trade and investment.[37]

2.3.2 Participating in the AML Drafting Process

The MOFCOM became involved in the AML legislation process in 2003. When the State Council started the AML drafting in 1994, it assigned the drafting responsibility to two agencies: the former State Economic and Trade Commission and the SAIC. As the State Economic and Trade Commission was dissolved in the 2003 government restructuring, its drafting responsibility was re-assigned to the MOFCOM, which was established in that

34 See note 29 above.

35 See note 30 above.

36 The State Council, *The Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the Ministry of Commerce* (《国务院办公厅关于印发商务部主要职责内设机构和人员编制规定的通知(国办发[2008]77 号)》), Art 15 of Part I and Art 11 of Part III (July 15, 2008).

37 The MOFCOM, *Mission*, The MOFCOM Website, December 7, 2010, http://english.mofcom.gov.cn/column/mission2010.shtml (accessed November 10, 2018).

restructuring.[38] Rising to the occasion, the MOFCOM began presenting itself as an ideal candidate for the AML enforcement agency position: in the first AML draft that the MOFCOM submitted to the State Council in 2004, it proposed to appoint itself as the sole enforcement agency.[39] However, that proposition was scratched out in later drafts, reportedly because of strong objections from other agencies.[40]

2.3.3 Establishing the Merger Review Authority

In the meantime, the MOFCOM began establishing its authority on merger review. The MOFCOM was formally established in the 2003 government restructuring to replace the former Ministry of Foreign Trade and Economic Cooperation, which was established in 1993 and whose responsibilities included no merger review. It also inherited part of the responsibilities of regulating domestic commerce from the former State Economic and Trade Commission, which used to be in charge of the domestic macro-economic management. Overall, the MOFCOM was established with the responsibility to govern domestic commerce.

To fulfill this responsibility, the MOFCOM started with controlling mergers involving foreign investors. From there, it founded and gradually developed the merger review regime in China.[41] In 2003, the MOFCOM adopted (in collaboration with three other agencies) a merger and acquisition ("M&A") Regulation, in which the MOFCOM added four articles empowering itself as a co-authority on merger review along with the SAIC.[42] Furthermore, in 2006, the MOFCOM issued a notification guideline to implement the M&A Regulation, thereby reinforcing its authority.[43] In contrast, despite holding the title of a co-authority on merger review, the SAIC never adopted any secondary regulation to strengthen its authority. It was observed that, in practice, the MOFCOM was far more active than the SAIC in terms of merger review.[44]

38 Shang Ming, *China's Developing Competition Policy and Legislation* (发展中的中国竞争政策与立法), Website of Department of Treaty and Law of the MOFCOM, Apr 22, 2005, http://tfs.mofcom.gov.cn/article/bc/200504/20050400081489.shtml (accessed November 10, 2018).

39 Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 125.

40 Owen, Sun, and Zheng, "China's Competition Policy Reforms," 261.

41 Hao, "The Multiple Hands," 31–32.

42 Articles 19–22 of the Provisional Regulation on Mergers and Acquisitions of Domestic Undertakings by Foreign Investors (《外国投资者并购境内企业暂行规定》), adopted by the Ministry of Foreign Trade and Economic Cooperation, the State Administration of Taxation, the State Administration of Industry and Commerce, and the State Administration of Foreign Exchange on March 13, 2003, effective on April 12, 2003, http://tfs.mofcom.gov.cn/article/date/i/s/200509/20050900366385.shtml (in Chinese) (accessed November 10, 2018). This Regulation was revised in 2006, with the adopting authorities expanded to six, and revised again in 2009 to accommodate the AML.

43 Tingting Weinreich-Zhao, *Chinese Merger Control Law: An Assessment of Its Competition-Policy Orientation after the First Years of Application*, Munich Studies on Innovation and Competition (Berlin Heidelberg: Springer-Verlag, 2015), 33.

44 Hao, "The Multiple Hands," 31, 33 (comparing the merger review records of the MOFCOM and the SAIC in terms of the depth of their substantive analyses and their reliance on local authorities).

The MOFCOM also enhanced its internal organization, in order to demonstrate its growing experience and capacity in the merger review arena. In 2004, it established an Anti-Monopoly Office in the Department of Treaty and Law to handle exclusively anti-monopoly work.[45] In 2008, a new Anti-Monopoly Bureau was established as a direct Department in the MOFCOM, replacing the previous Anti-Monopoly Office. The secretariat office of the AMC was also set up in the Anti-Monopoly Bureau.

The MOFCOM also used its multiplicity of responsibilities to build its merger review portfolio. As the ministry dealing with international trade and commerce issues on behalf of the Chinese government, the MOFCOM has numerous channels for engaging in transnational dialogues, especially after the accession to the WTO in 2001. Not surprisingly, the MOFCOM was able to use those channels to build its merger review expertise. For instance, in 2004 the MOFCOM established a dialogue with the European Commission on competition policy, and since then this dialogue has been held annually.[46] For several times, the MOFCOM also invited the American Bar Association to comment on the AML drafts.[47] These activities enhanced the MOFCOM's qualification as a candidate for the AML public enforcer position. Eventually after the AML was adopted, the MOFCOM secured its position as the exclusive merger review authority in the AML regime.

2.3.4 The Enforcement Records

In the tripartite era of AML enforcement, the MOFCOM made some improvements regarding its merger review procedures. In the first four years after the AML came into effect, the MOFCOM were criticized for having too lengthy and non-transparent review procedures,[48] and for disclosing unconvincingly brief review decisions.[49] This could probably be attributed to the MOFCOM's lack of experience and manpower in the beginning. Admittedly, these problems persisted to a certain extent until the end of the tripartite era, but over the years, particularly from 2013 onward, the MOFCOM made some efforts to be more elaborate when

45 Ibid., 32.

46 News Office of the MOFCOM, *The MOFCOM Held Press Conference on the Anti-Monopoly Enforcement of 2011* (商务部召开“2011 年反垄断工作主要情况”专题新闻发布会), The MOFCOM Website, December 27, 2011, http://www.mofcom.gov.cn/article/ae/ztfbh/201112/20111207901483.shtml (in Chinese) (accessed November 10, 2018).

47 For the comments prescribed, see the American Bar Association: Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China, July 15, 2003, http://apps.americanbar.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf (accessed November 10, 2018).

48 Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," 689.

49 The MOFCOM only disclosed prohibition decisions and decisions of conditional clearance. All those decisions to date are available at (in Chinese) http://fldj.mofcom.gov.cn/article/ztxx/ (accessed November 10, 2018). For a discussion on the briefness of the MOFCOM decisions, see Caroline Cauffman and Qian Hao, "Comparison of the EU and Chinese System of Procedural Rights," in *Procedural Rights in Competition Law in the EU and China*, ed. Caroline Cauffman and Qian Hao (Berlin, Heidelberg: Springer Berlin Heidelberg, 2016), 237–38, https://doi.org/10.1007/978-3-662-48735-8_9.

it came to prohibition decisions or decisions of conditional clearance.[50] More importantly, with the adoption of a simplified notification procedure on less complicated cases in 2014,[51] the MOFCOM made its review procedure significantly standardized and timely.

Before its merger control responsibility was absorbed by the SAMR, the MOFCOM had thirty-one internal Departments, one accredited office by the Central Discipline Inspection Commission, one special task-force office, and one advisory committee on economic and trade policy.[52] The Anti-Monopoly Bureau was one of the internal Departments. Reportedly, the Anti-Monopoly Bureau had about a total of thirty-five staff members[53] from seven divisions: the General Office, the Competition Policy Division, the Pre-filing Consultation Division, the Division of Law, the Division of Economy, the Supervision and Enforcement Division, and the AMC Coordination Division.[54]

The MOFCOM began accepting merger notifications immediately after the AML came into effect. On November 18, 2008, it published the first conditional approval decision. Since then, the numbers of notifications and published decisions had been continuously increasing. Most of the merger cases handled by the MOFCOM were unconditionally cleared. Up until July 20, 2018, there have been two prohibition decisions and thirty-six conditional clearance decisions.[55]

50 Fei Deng and Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, The Antitrust Source (October 2013), 4 https://www.americanbar.org/content/dam/aba/directories/antitrust/oct13_deng_10_29f.authcheckdam.pdf (accessed November 10, 2018); *A Ten-Year Review of Merger Enforcement in China*, The Antitrust Source (August 2018), 5 https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/atsource-aug2018/aug18_deng_8_16f.pdf (accessed November 10, 2018).

51 The Provisional Regulation on the Criteria Applying to Simple Cases of Concentration of Undertakings (《关于经营者集中简易案件适用标准的暂行规定》), adopted by the MOFCOM on February 11, 2014, effective on February 12, 2014, http://fldj.mofcom.gov.cn/article/c/201409/20140900743277.shtml (in Chinese) (accessed November 10, 2018). See also, the MOFCOM, *The Guidelines on the Notification of Simple Cases of Concentration of Undertakings (for Trial Implementation)* (《关于经营者集中简易案件申报的指导意见(试行)》), April 18, 2014, http://fldj.mofcom.gov.cn/article/c/201404/20140400555353.shtml (in Chinese) (accessed November 10, 2018).

52 The MOFCOM, *Internal Departments* (内设机构), The MOFCOM Website, http://www.mofcom.gov.cn/mofcom/bujiguan.shtml (accessed November 10, 2018).

53 Yong Huang and Richean Zhiyan Li, "An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation," in Emch and Stallibrass, *China's Anti-Monopoly Law: The First Five Years*, 9.

54 The Anti-Monopoly Bureau of the MOFCOM, *Internal Departments* (内设机构), The Anti-Monopoly Bureau Website, Mar 13, 2010, http://fldj.mofcom.gov.cn/article/gywm/200811/20081105868495.shtml (accessed November 10, 2018).

55 For the list of cases, see note 49 above. For a statistical analysis of these cases, see Shao Geng, *The Compilation and Statistics of the MOFCOM's Review Announcements and Penalty Decisions on Concentration between Undertakings* (商务部经营者集中反垄断审查公告、处罚决定(函)汇编及统计数据), Zhihu Website, https://zhuanlan.zhihu.com/p/20357507 (in Chinese) (accessed November 10, 2018). For more analyses of those prohibition and conditional clearance decisions, see generally, Mark Furse, "Evidencing the Goals of Competition Law in the People's Republic of China: Inside the Merger Laboratory," *World Competition* 41, no. 1 (2018): 129–68; Cunzhen Huang and Fei Deng, "Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China," *Antitrust* 31, no. 2 (2017): 44–50.

2.4 The SAIC

2.4.1 The Entrusted Responsibilities

The State Council's Three-Designation Order pertaining to the SAIC required the latter to establish an Anti-Monopoly and Anti-Unfair Competition Bureau that is responsible for law enforcement on non-price-related anticompetitive agreements, abuse of dominant position, and abuse of administrative power to exclude or restrain competition.[56]

The SAIC's overall responsibilities included the following:

- Maintaining the market order;
- Protecting the legitimate rights and interests of business operators and consumers in the fields of enterprise registration, competition and trademark protection;
- Taking charge in business coordination among local Administrations for Industry and Commerce (AICs) at or below the provincial level nationwide, and giving relevant guidance thereof.[57]

Because of the micro-management nature of its responsibilities, the SAIC frequently delegated its AML enforcement authority to local AICs.[58] Also, it was observed that in reality the SAIC used to have a lower status than the NDRC and the MOFCOM, despite having the same administrative rank.[59]

2.4.2 The SAIC's Qualification as an AML Enforcement Agency

The SAIC's claim to be an AML enforcement agency was mainly based on its experience in enforcing the Anti-Unfair Competition Law since 1993.[60] In 1994, the SAIC established a Fair Trade Bureau, under which an Anti-Monopoly Office was set up to deal with anti-monopoly cases exclusively. Following the SAIC's internal institutional setting, local AICs also established their respective Fair-Trade divisions. In 2002, the State Council upgraded the SAIC to the ministerial level ("zhengbu ji"), making it the direct subordinate of the State Council in charge of market supervision and regulation.[61] Furthermore, with the adoption of the 2003 M&A Regulation, the SAIC held the title of co-controller of mergers of domestic undertakings by foreign investors.[62]

56 The State Council, *The Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the State Administration for Industry and Commerce* (《国务院办公厅关于印发国家工商行政 管理总局主要职责内设机构和人员编制规定的通知(国办发[2008]88 号)》), Art 6 of Part II and Art 3 of Part III, (July 11, 2008).

57 The SAIC, *Mission*, The SAIC Website, http://home.saic.gov.cn/english/aboutus/Mission/index.html (accessed November 10, 2018).

58 For exemplifications on this point, see the case analyses in Section 2 (particularly Section 2.3.3) of Chapter 6 of this dissertation.

59 Hao, "The Multiple Hands," 30.

60 Before the 2017 revision, the Anti-Unfair Competition Law covered many types of monopolistic conduct that were later stipulated in the AML. See note 5 above.

61 Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 126.

62 See note 42 above.

The SAIC's participation in the early stage of the AML drafting process also supported its claim to be an AML enforcement agency. In 1994, when the legislature added the AML to the legislative agenda, it was the SAIC that was entrusted with the drafting task, along with the former State Economic and Trade Commission. Since then the SAIC had been participating in the drafting process, until in 2003 when the State Economic and Trade Commission was dissolved and the drafting task was mostly taken over by the newly established MOFCOM.[63] When the MOFCOM proposed to name itself as the sole AML enforcer, it was the SAIC that successfully blocked that proposition, with the help of some other ministries.[64] To further demonstrate its qualification as a suitable candidate, the SAIC released an investigation report about the anticompetitive practices of multinational companies in China and prescribed a few corrective measures.[65] Eventually, the SAIC secured the position as one of the AML public enforcement agencies.

2.4.3 The Enforcement Records

Before being restructured into the SAMR, the SAIC had fifteen internal departments.[66] Among them, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau was the department responsible for competition regulation. It was a direct subordinate to the SAIC and a replacement for the former Fair Trade Bureau after the AML came into effect in 2008. Local AICs followed the step and established their respective Competition Enforcement Bureaus.

There were eight divisions within the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, and three of them were responsible for the AML enforcement: the Division of Anti-Monopoly Guidance, the Anti-Monopoly Enforcement Division I and the Anti-Monopoly Enforcement Division II.[67] The actual officials handling anti-monopoly cases in the SAIC were approximately no more than twenty.[68]

The SAIC remained quite inactive from 2008 to 2013, possibly because of the limited capacity. In June 2009, the SAIC adopted two procedural regulations for the AML implementation, one

63 Owen, Sun, and Zheng, "China's Competition Policy Reforms," 236.

64 Ibid., 261.

65 Ibid., 260. This report was titled "Competition-restrictive Practices by Multinational Companies in China and Counter Measures" (《在华跨国公司限制竞争行为表现及对策》) and available (by payment and in Chinese) at http://www.cnki.com.cn/Article/CJFDTotal-GSXZ200405031.htm (accessed November 10, 2018).

66 The SAIC, *Departments*, The SAIC Website, http://home.saic.gov.cn/english/aboutus/Departments/ (accessed November 10, 2018).

67 The SAIC, *The Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (The Bureau for Regulating Direct-Selling Regulation and Cracking down Pyramid-Selling)*, The SAIC Website, May 23, 2009, http://home.saic.gov.cn/jggk/jgsz/nsjg/fldyfbzdjz/ (in Chinese) (accessed November 10, 2018).

68 This number was estimated based on a statement made by the NDRC Director. See the NDRC, *The Minutes of Director Kunlin Xu Attending the Antitrust Enforcement Press Release Held by the State Council Information Office* (许昆林局长参加国务院新闻办公室反垄断执法工作情况新闻吹风会实录), The NDRC Website, http://jjs.ndrc.gov.cn/gzdt/201409/t20140915_625585.html (in Chinese) (accessed November 10, 2018). See also, Hao, "The Multiple Hands," 31.

pertaining to administrative monopolies and the other one pertaining to anticompetitive agreements and abuse of dominance.[69] In December 2010, it adopted two substantive implementation regulations, one for regulating anticompetitive agreements and one for abuse of dominance.[70] Besides adopting these regulations, the SAIC made efforts to train local AIC officials for the AML enforcement and to promote cooperation with foreign competition authorities.[71] An enforcement highlight during that period was the launch of investigation on *Tetra Pak*, the SAIC's first AML operation against a multinational company.[72] This case was closed on November 9, 2016 with hefty fines.[73]

It was not until 2013 that the SAIC started to disclose its enforcement cases on its website.[74] By October 15, 2018, the SAIC has made a total of seventy announcements of AML enforcement cases. These announcements are summarized in Table 1.

Table 1. The AML enforcement announcements issued by the SAIC from 2013 to 2018

	2013	2014	2015	2016	2017	2018
Penalty decisions of anticompetitive agreement cases	12	3	4	4	3	2
Penalty decisions of abuse of dominance cases		4	3	9	4	1
Decisions to suspend a case investigation		1	5		1	2
Decisions to terminate a case investigation			1	1	5	3
Penalty decisions for being uncooperative during investigation			1			
In total (each year)	12	8	14	14	13	8

69 The Regulation on the Procedure for the Prevention of Conduct Abusing Administrative Powers to Eliminate or Restrict Competition (《工商行政管理机关制止滥用行政权力排除、限制竞争行为程序规定》), adopted by the SAIC, effective on July 1, 2009, http://home.saic.gov.cn/fldyfbzdjz/zcfg/xzgz/200909/t20090928_233541.html (in Chinese) (accessed November 10, 2018); the Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position (《工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定》), adopted by the SAIC, effective on July 1, 2009, http://home.saic.gov.cn/fldyfbzdjz/zcfg/xzgz/200910/t20091013_233540.html (in Chinese) (accessed November 10, 2018).

70 The Regulation on the Prohibition of Monopoly Agreement Conduct (《工商行政管理机关禁止垄断协议行为的规定》), adopted by the SAIC on December 31, 2010, effective on February 1, 2011, http://home.saic.gov.cn/fldyfbzdjz/zcfg/xzgz/201101/t20110107_233539.html (in Chinese) (accessed November 10, 2018); the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (《工商行政管理机关禁止滥用市场支配地位行为的规定》), adopted by the SAIC on December 31, 2010, effective on February 1, 2011, http://home.saic.gov.cn/fldyfbzdjz/zcfg/xzgz/201101/t20110107_233538.html (in Chinese) (accessed November 10, 2018).

71 The SAIC, *The Competition Enforcement Bureau Sends Officers to Participate in the Chinese Competition Policy Forum* (竞争执法局派员参加中国竞争政策论坛), The SAIC Website, August 7, 2013, http://home.saic.gov.cn/fldyfbzdjz/gzdt/201308/t20130807_205466.html (in Chinese) (accessed November 10, 2018).

72 Zhang Xiaosong, *The SAIC: Tetra Pak Being Investigated for the Suspicion of Dominance Abuse* (利乐公司涉嫌滥用市场支配地位被立案调查), The State Council Website, July 5, 2013, http://www.gov.cn/jrzg/2013-07/05/content_2441372.htm (in Chinese) (accessed November 10, 2018).

73 This is a landmark case in the AML enforcement history in many aspects. It is analyzed in Sections 2.3.2, 2.4.1, and 2.6.1 of Chapter 6 of this dissertation.

74 All of the enforcement cases disclosed by the SAIC are currently available at http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/index.html (accessed November 10, 2018). For a statistical analysis of those decisions, see Shao Geng, *The Compilation and Statistics of the SAIC's Disclosed Anti-Monopoly Enforcement Case Decisions* (工商总局已公布反垄断执法案件处理决定汇编与数据统计), Zhihu Website, https://zhuanlan.zhihu.com/p/20373716?columnSlug=competitionlaw (in Chinese) (accessed November 10, 2018).

Three points are notable regarding these announcements:

- First, a decision to terminate a case investigation is usually based on a decision to suspend investigation made previously, but there are two exceptions: the termination of the *Ordos City Gas* case in 2017 (allegedly suspended in 2016, but no announcement published) and the termination of the *Jinagsu Hai'an Power Grid* case in 2016 (allegedly suspended in 2014, but no announcement published). By October 15, 2018, there is one case being suspended of investigation: the *Ningxia Mobile* case (suspended in2015).
- Secondly, it is clear from the announcement records that, by October 15, 2018, the SAIC has closed fifty cases that resulted in penalties: twenty-nine of them are anticompetitive agreement cases and the other twenty-one are abuse of dominance cases. Notably, the time of a penalty decision being made does not always correspond with the year it was announced by the SAIC; there is usually a delay in the announcement. The delay could be up to two or three years, as exemplified by some of the cases decisions announced in 2013.
- Thirdly, only two cases were personally handled by the SAIC (the *Tetra Pak* case in 2016 and the *Beijing Shengkai* case in 2015, which was terminated without penalty). The rest of the cases were all handled by provincial AICs under case-by-case delegations of the SAIC.[75] This exemplifies the SAIC's dependence on local AICs for enforcing the AML.

2.5 The NDRC

2.5.1 The Long-Standing Authority on Price Control

The State Council's Three-Designation Order pertaining to the NDRC entrusted the latter with the responsibility of regulating "price-related monopolistic conduct".[76] It required the NDRC to establish a Department of Price Supervision and Examination to fulfill that function.

The predecessor of the NDRC was the State Planning Commission, which was established in 1952 and used to manage nearly all aspects of the nation's macro- economy in the era of centrally planned economy. As China's "reform and opening-up policy" deepened, the State Planning Commission gradually became incompatible with the rising market dynamics. Eventually, it was replaced by the NDRC in 2003, after several rounds of government restructuring started in 1982.[77]

75 Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 137.

76 The State Council, *The Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the National Development and Reform Commission* (《国务院办公厅关于印发国家发展和改革委员会主要职责内设机构和人员编制规定的通知(国办发[2008]102 号)》), Art 3 of Part II and Art 23 of Part III, (July 15, 2008).

77 Peter Martin, "The Humbling of the NDRC: China's National Development and Reform Commission Searches for a New Role Amid Restructuring," *China Brief* 14, no. 5 (2014): 15, https://jamestown.org/program/the-humbling-of-the-ndrc-chinas-national-development-and-reform-commission-searches-for-a-new-role-amid-restructuring/ (accessed November 10, 2018).

The NDRC's main responsibilities include the following: (1) formulating, implementing, and coordinating plans and strategies concerning macro-economy and social development; (2) reviewing and approving the central government's investments and key construction projects; (3) summarizing and analyzing fiscal and financial situations, and (4) maintaining the balance and control over important commodities.[78]

Two features of the NDRC are notable. The first one is its omnipresent influence as a policy maker over a wide range of areas that involve macro-level policy formulation and strategic economic control.[79] The second feature is its strong interventionist characteristic as a top regulator. The NDRC inherited many interventionist missions from its predecessor, and price control was one of them, as exemplified by its sole authority to enforce the 1997 Price Law.[80]

Not surprisingly, the NDRC's long-standing authority on price control gave it a leading position in the race to be an AML enforcement agency: Price control of certain industries remains strategically crucial in the blueprint of the "socialist market economy". In that regard no other agency is more experienced or authoritative than the NDRC.[81]

2.5.2 The Enforcement Records

From 2008 to 2012, the NDRC as an AML enforcer focused on drafting implementation regulations and building its capacity. In 2010, the NDRC adopted *the Regulation on Anti-Price Monopoly*, which clarified the scope of "price-related monopolistic conduct" as including price-related monopolistic agreements and abuse of dominant position through price manipulation.[82] At the same time, it also adopted *the Regulation on the Administrative Enforcement Procedures of Anti-Price Monopoly*, which laid down the procedural rules for its AML enforcement.[83] In 2011, the NDRC renamed the Department of Price Supervision and Examination, which it established under the instruction of the Three-Designation Order, as the Bureau of Price Supervision and Anti-Monopoly.[84] It expanded this Bureau's staff by adding three work units and twenty employees, all of who were to handle AML work exclusively.[85]

78 The NDRC, *Main Functions of the NDRC*, The NDRC Website, http://en.ndrc.gov.cn/mfndrc/ (in Chinese) (accessed November 10, 2018).

79 Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 126.

80 Ibid., 127.

81 Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," 696.

82 Articles 3 and 5–9 of the Regulation on Anti-Price Monopoly (《反价格垄断规定》), adopted by the NDRC on December 29, 2010, effective on February 1, 2011, http://www.gov.cn/flfg/2011-01/04/content_1777969.htm (in Chinese) (accessed November 10, 2018).

83 The Regulation on the Administrative Enforcement Procedures of Anti-Price Monopoly (《反价格垄断行政执法程序规定》), adopted by the NDRC on December 29, 2010, effective on February 1, 2011, http://jjs.ndrc.gov.cn/zcfg/201101/W020110104343453311990.pdf (in Chinese) (accessed November 10, 2018).

84 The NDRC, *Bureau of Price Supervision and Anti-Monopoly*, The NDRC Website, http://en.ndrc.gov.cn/mfod/201207/t20120719_492595.html (accessed November 10, 2018).

85 Sohu News, *The Anti-Monopoly "Hunter"* (反垄断"猎人"), Business Sohu, August 20, 2014, http://business.sohu.com/s2014/jrzj328/ (in Chinese) (accessed November 10, 2018).

During that period, the NDRC also organized multiple conferences and seminars with the participation of antitrust officials from foreign jurisdictions, practicing lawyers, and executives of multinational companies.[86] The NDRC also built dialogues with DG Comp of the European Commission, the Department of Justice and the Federal Trade Commission of the US, the Office of Fair Trading of the UK, and the Fair Trade Commission of South Korea.[87]

The NDRC's enforcement activities from 2008 to 2013 were hardly visible. During that period, there were only four enforcement cases disclosed on the NDRC's website. Two cases were handled in 2011, and both were about horizontal price-fixing agreements.[88] The other two were handled in 2013, one about horizontal price-fixing and the other one about resale price maintenance.[89] All four cases resulted in financial penalties, but the NDRC never disclosed the formal prohibition decisions.

Another thing worth noting was that, in November 2011, the NDRC announced its AML investigation against China Telecom and China Unicom, two of the largest Chinese state-owned enterprises.[90] The NDRC concluded after investigation that there were violations of the AML, but it imposed no penalty. Eventually the NDRC decided to bury the case, after accepting Telecom and Unicom's promises to rectify their monopolistic practices.[91] This case had ambivalent effects: On the one hand, the high-profile investigation showed the

86 For a public record of the Bureau's anti-monopoly activities, see the NDRC Website, http://jjs.ndrc.gov.cn/fjgld/index.html (in Chinese) (accessed November 10, 2018).

87 For example, see the NDRC, *The NDRC and the DG Comp Jointly Hosted the International Seminar on Price Monopoly* (国家发展改革委与欧盟竞争总司联合举办反价格垄断国际研讨会), The NDRC Website, http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465417.html (in Chinese) (accessed November 10, 2018); *The Antitrust Agencies of China and the US Signed Memorandum of Understanding on Cooperation* (中美反垄断和反托拉斯执法机构签署反垄断合作谅解备忘录), http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465413.html (in Chinese) (accessed November 10, 2018); *The NDRC and the UK Fair Trade Commission Signed Memorandum of Understanding on Antitrust Cooperation* (国家发展改革委与英国公平交易办公室签署反垄断合作谅解备忘录), http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465418.html (in Chinese) (accessed November 10, 2018); *Deputy Director Hu Zucai Met with South Korean Fair Trade Commissioner Jin Dongzhu and Signed Memorandum of Understanding on Antitrust Cooperation* (胡祖才副主任会见韩国公平交易委员会主席金东洙并签署反垄断合作谅解备忘录), http://jjs.ndrc.gov.cn/fjgld/201205/t20120530_482586.html (in Chinese) (accessed November 10, 2018).

88 The NDRC, *The Paper Association of Fuyang, Zhejiang, Severely Punished for Implementing Price Cartelization* (浙江省富阳市造纸行业协会组织实施价格垄断行为受到严厉处罚), The NDRC Website, http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465485.html (in Chinese) (accessed November 10, 2018); *Two Pharmaceutical Companies Severely Punished for Monopolizing Compound Reserpine* (两医药公司垄断复方利血平原料药受到严厉处罚), http://jjs.ndrc.gov.cn/fjgld/201203/t20120306_465386.html (in Chinese) (accessed November 10, 2018).

89 The NDRC, *Six Foreign Undertakings Punished for Implementing Price Monopoly of LCD Panels* (六家境外企业实施液晶面板价格垄断被依法查处), http://jjs.ndrc.gov.cn/gzdt/201301/t20130117_523203.html (in Chinese) (accessed November 10, 2018); *Baby Formula Producers Fined ¥668.73 million for Violating the Anti-Monopoly Law* (合生元等乳粉生产企业违反反垄断法限制竞争行为共被处罚6.6873亿元), http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html (in Chinese) (accessed November 10, 2018).

90 Ma Xiaofang and Guo Liqin, The Unexpected Investigation against Telecom and Unicom: The AML Shaking Centrally-Owned Enterprises for the First Time (电信联通意外遭调查,《反垄断法》首撼央企), Yicai News, November 10, 2011, http://www.yicai.com/news/1187660.html (in Chinese) (accessed November 10, 2018).

91 China News Net, *The NDRC: China Telecom and Unicom Have Rectified Their Monopolistic Conduct* (发改委: 中国电信和联通已就反垄断案进行整改), Sina Finance, February 19, 2014, http://finance.sina.com.cn/chanjing/cyxw/20140219/111018264145.shtml (in Chinese) (November 10, 2018).

NDRC's determination to enforce the AML, but on the other hand, the setting-aside also showed the political pressures and interferences that the AML enforcement is subject to.[92]

The NDRC began to publish its enforcement decisions in 2014. The first decision it published was a decision made at the end of 2013. Whereas the SAIC delegated the enforcement power to local AICs on a case-by-case basis, the NDRC gave general authorizations to local DRCs to enforce the AML.[93] Compared with the SAIC, the NDRC was performing poorly in disclosing its enforcement decisions. Local DRCs also handled AML cases, but they were not systematically recorded by the NDRC.[94]

The case decisions published on the NDRC website can be listed as follows, according to the year when they were made:[95]

Table 2. The AML enforcement decisions issued by the NDRC from 2008 to 2018

	2013	2014	2015	2016	2017	2018
Cases of horizontal anticompetitive agreements	1	1	1	2	1	0
Cases of vertical anticompetitive agreements	0	0	0	1	0	0
Cases of abuse of dominance	0	0	1	0	1	0

3 The Supervision on the AML Public Enforcement

3.1 The Possibility of Administrative Litigation against "Concrete Administrative Actions"

3.1.1 The Legal Basis

Art 53 provides the legal basis for administrative litigations against the abovementioned public enforcement agencies. As it states,

> Where an undertaking is dissatisfied with the decision made by the authority for enforcement of the Anti-Monopoly Law in accordance with the provisions of Article 28 or 29 of this Law, it may first apply for administrative reconsideration according to law; and if it is dissatisfied with the decision made after administrative reconsideration, it may bring an administrative action before the court according to law.

92 Wang, *The Evolution of China's Anti-Monopoly Law*, 398–99.

93 Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 137.

94 There are several cases that were headline-grabbing but were not disclosed by the NDRC, such as the *Wuliangye* case handled by the DRC of Sichuan Province. No formal decision of this case was disclosed. For a brief news report on this case, see the Sichuan DRC, Wuliangye Being Fined ¥202 million for Implementing Price-Monopoly (五粮液公司实施价格垄断被处罚2.02亿元), Sina Finance, February 22, 2013, http://finance.sina.com.cn/chanjing/b/20130222/164314620476.shtml (in Chinese) (accessed November 10, 2018).

95 The cases disclosed by the NDRC can be found on its website: http://jjs.ndrc.gov.cn/fjgld/ (in Chinese) (accessed November 10, 2018).

> Where an undertaking is dissatisfied with any decision made by the authority for enforcement of the Anti-Monopoly Law other than the decisions specified in the preceding paragraph, it may apply for administrative reconsideration or bring an administrative action before the court according to law.

In other words, an administrative reconsideration procedure is prerequisite for a party that intends to challenge a merger review decision before a court, but it is *optional* for parties intending to challenge before a court an enforcement decision regarding anticompetitive agreements or abuse of dominance. It was suggested that this separate setting took a special account of the high complexity of merger analyses.[96]

However, not all of the enforcement agencies' activities can be sued. According to Art 13(2) of the Administrative Litigation Law, which is the *lex generalis* governing the administrative litigations under the AML, only "specific administrative actions" are judicially reviewable.[97] This means that the AML enforcement agencies' concrete decisions that impose penalties and coercive measures could be brought under judicial supervision.[98] Meanwhile, "abstract administrative actions", such as the ruling-making activities by the enforcement agencies, are outside the reach of judicial supervision.

3.1.2 The Case Records

This dissertation understands "AML administrative suits" as "judicial actions initiated by undertakings against one or more administrative agencies after being sanctioned by the latter under the AML". Accordingly, five AML administrative suits can be recorded through publicly accessible sources by October 15, 2018.[99] They are listed in Table 3.

96 Angela Huyue Zhang, "The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective," *Antitrust Bulletin* 56 (2011): 637–39.

97 Administrative Litigation Law (also translated as "Administrative Procedure Law") of the People's Republic of China (《中华人民共和国行政诉讼法》), adopted by the Seventh National People's Congress on April 4, 1989, effective on October 1, 1990, last revised on June 27, 2017, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm (accessed November 10, 2018).

98 Jessica Su and Xiaoye Wang, "China The Competition Law System and the Country's Norms," in *The Design of Competition Law Institutions: Global Norms, Local Choices*, ed. Eleanor M Fox and Michael J Trebilcock (Oxford University Press, 2012), 205.

99 These case judgments can be sought out on the website run by the Supreme People's Court): http://wenshu.court.gov.cn (中国裁判文书网) (in Chinese). These five cases were located in two search steps:
First, search with the combination of the following sets of entries: (1) case type: "administrative case" (案件类型:行政案件); (2) document type: "judgment"/"statement of decision" (文件类型:判决书/裁定书); (3) search throughout the document: "anti-monopoly law" (全文检索:反垄断法); (4) cause of action (third level): "administration for industry and commerce"/"price administration" (三级案由:工商行政管理/物价行政管理). There are forty-seven search results by October 15, 2018 (thirty-nine + 2 when the cause of action is defined as "administration for industry and commerce", and four + 2 when the cause of action is defined as "price administration"); Secondly, hand-collect and analyze the contents of these forty-seven search results, so as to verify whether they fit the profile of "one or several undertakings suing an administrative agency after being sanctioned by the latter under the AML". Consequently, there are thirty-five search results that fit into the profile. According to the case facts, these thirty-five search results pertain to five different cases. The locating of the five cases is confirmed by practitioners' observations. See for example, Dentos Antitrust Team, *Administrative Litigation: Decade of AML enforcement* (《反垄断法》实施十周年回顾: 不服处罚决定的行政诉讼案件综述), https://mp.weixin.qq.com/s/vEgYVtFAy84o8HlitSV4fQ (in Chinese) (accessed November 10, 2018).

Table 3. The AML administrative suits by October 16, 2018

Year of action filed	The plaintiff(s)	The defendant(s)	The handling court(s)	The anticompetitive practice(s) involved	The case result
2014	Two concrete manufacturers in Nanjing, Jiangsu Province[100]	The DRC of Jiangsu Province	The Nanjing Intermediary Court	Horizontal price-fixing agreements	Dismissal of actions for exceeding the statutory limitations
2016	Twenty-two accounting firms in Shandong Province	The AIC of Shandong Province; the Government of Shandong Province; the SAIC[101]	The litigation in Jinan: the Lixia District Court of Jinan Municipality (first instance); the Jinan Intermediary Court (appeal). The litigation in Beijing: the Xicheng District Court of Beijing Municipality (first instance); the Beijing Second Intermediary Court (appeal); the Beijing High Court (retrial).	Market-sharing agreements	Upholding wholly the initial enforcement decision
2016	A provider of auto-check services in Xi'an, Shaanxi Province	The DRC of Shaanxi Province	The Railway Transport Court of Xi'an (first instance); the Railway Transport Intermediary Court of Xi'an (appeal)	Horizontal price-fixing agreements	Upholding wholly the initial enforcement decision

100 The NDRC, *Two Concrete Manufactures in Jiangsu Province Lost their Appeal against the Antitrust Penalty Decision* (江苏省两家混凝土企业不服反垄断处罚败诉), The NDRC Website, http://jjs.ndrc.gov.cn/gzdt/201412/t20141208_651321.html (in Chinese) (accessed November 10, 2018). See also, Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 144.

101 These twenty-two accounting firms split three ways and resorted to three different litigation strategies: Eight of them initiated an administrative litigation before the Lixia District Court, immediately after receiving the sanction decision. Another eight of them filed for an administrative reconsideration before the Shandong People's Government, and launched an administrative litigation after the reconsideration was decided against them. The remaining seven of them filed for an administrative reconsideration before the SAIC, and launched an administrative litigation in Beijing after the SAIC decided against them. See Dentos Antitrust Team, *Administrative Litigation: Decade of AML enforcement* (note 99 above).

Table 3. The AML administrative suits by October 16, 2018 (Continued)

Year of action filed	The plaintiff(s)	The defendant(s)	The handling court(s)	The anticompetitive practice(s) involved	The case result
2017	A fodder producer in Haikou, Hainan Province	The DRC of Hainan Province	The Haikou Intermediary Court (first instance); the Hainan High Court (appeal)	Resale price maintenance	The first instance judgment quashed the enforcement decision (on the ground of insufficient finding of anticompetitive effects), but the appeal judgment reversed the first instance judgment, ruling in total favor of the enforcement agency.[102]
2017	A supplier of electronic payment cipher instruments in Shanghai	The AIC of Anhui Province; the SAIC[103]	The Xicheng District Court of Beijing Municipality (first instance); the Beijing Second Intermediary Court (appeal);	Horizontal agreements of market-sharing and price-fixing	Both the first instance and appeal courts upheld the enforcement decision.

102 The Hainan High Court did so based mainly on the reasoning that, for a resale price maintenance agreement to violate the AML, it is not necessary to meet the condition of "having anticompetitive effects". This case is analyzed in Section 2.9.3 of Chapter 6 of this dissertation.

103 After being sanctioned by the Anhui AIC, the undertaking in question first applied for an administrative consideration before the SAIC. After the SAIC reconsidered and decided against it, the undertaking resorted to administrative litigation.

3.1.3 The Virtual Absence of Judicial Supervision on Public Enforcement

According to the records of public enforcement presented in Sections 2.4.3 and 2.5.2, there are at least eighty-three enforcement cases by the SAIC and the NDRC (including their local agencies) by October 15, 2018. On that basis, the ratio of an enforcement decision being challenged is 5:83, and the rate of a successful challenge has been zero. In the beginning years of the AML's implementation, it was predicted that administrative litigations are unlikely to play a significant role in the near future, because businesses would fear the potential retaliation from the agencies.[104] These numbers seem to confirm that prediction. Presumably, they also reflect businesses' generally low confidence in effective judicial supervision on the AML enforcement agencies.[105]

That being said, the five cases in Table 3 offer a more nuanced account: when the stakes are high enough, an undertaking could also be highly motivated to challenge an enforcement decision. In that regard, the motivation level would be high enough to outweigh the undertaking's possible distrust of judicial supervision and to prompt the adoption of whatever action available. This kind of high-level motivation was exemplified in the *Shandong Accounting Firms* case, where the plaintiffs exhausted the available ways to challenge the enforcement decision in question.[106] It was also exemplified by the fact that, except the *Jiangsu Concrete* case that was dismissed on procedural grounds, in all the other four cases (where the substance of the enforcement decisions was exposed to judicial review), the plaintiffs all chose to appeal after the first instance judgments ruled against them. Another possible and supplementary account is that the undertakings in these five cases had more trust in judicial supervision than the undertakings in the cases that were not appealed.

Here, a relevant question is, when an enforcement decision is brought before a court (by sufficiently motivated plaintiffs), to what extent would the court be willing to engage in judicial scrutiny? To answer this question, it is important to first take into account the supposed function of administrative litigation in the Chinese governance system: administrative litigation is essentially a third-party mechanism for the authoritarian "ruler" to monitor the agencies with delegated powers, and therefore they are supposed to constrain low officials but not high officials.[107]

In that light, the answer would be that a court is likely to refrain from, or perform only perfunctorily, judicial scrutiny when facing an enforcement decision of a central agency

104 Su and Wang, "China The Competition Law System and the Country's Norms," 206.

105 To rebut this presumption, an empirical study needs to be conducted as to why most of the sanctioned undertakings decided not to sue. This falls outside the scope of this dissertation, so here this presumption is taken as it is.

106 See note 101 above.

107 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," 68–69.

(the SAIC, the NDRC, or the SAMR since March 21, 2018).[108] The case records listed in Table 3 confirm this: First, the enforcement decisions brought before court were all made by local agencies. Secondly, in the two cases where a central agency (the SAIC) was subsequently involved in the administrative litigation procedures (for upholding the original enforcement decisions at the end of two administrative reconsideration proceedings), the courts at hand reviewed only the original decisions instead of the SAIC's reconsideration decisions, before echoing the SAIC's conclusions. This problem reflects the gloomy landscape of administrative litigation in China: due to the lack of judicial independence, the courts are generally reluctant to review administrative acts, even if they are legislatively empowered to do so.[109] This lack of judicial independence is fundamentally embedded in the Chinese one-party polity.[110]

The case records provide no evidence that judicial scrutiny on local agencies is in any way more present. Theoretically speaking, the situation is more nuanced at the local judiciary level, in the sense that, while local courts may be pressured by local governments to stay deferential, they also face a countervailing strand of pressure from the higher courts that urge them to carry out their judicial review responsibilities.[111] However, in the AML context where the decision-making power of local agencies always stems from the central agencies (either by delegations on an individual basis from the SAIC or a general authorization from the NDRC), the political stakes to exert judicial review could simply be too high for local courts (including those higher courts).[112] In that event, it is questionable whether and to what extent such pressures from higher courts are present. In fact, a higher court could turn out to be even more deferential than a subordinate court, as evidenced by the *Hainan Fodder* case.

To sum up at this point, there is virtually no judicial supervision on the AML public enforcement. This could be attributed to two factors. The first one is the rarity of an enforcement decision being challenged later in an administrative litigation. This rarity could be explained by the sanctioned undertakings' reluctance to sue, due to the fear of retaliation or simply the low

108 Angela Huyue Zhang, "Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope," *Stanford Journal of International Law* 51, no. 2 (2015): 211–12.

109 He Haibo, "Litigations without a Ruling: The Predicament of Administrative Law in China," *Tsinghua China Law Review* 3 (2011): 265–66.

110 Minxin Pei, *China's Crony Capitalism: The Dynamics of Regime Decay* (Cambridge, Massachusetts: Harvard University Press, 2016), 32, 217 (highlighting that the Chinese Communist Party's fundamental interest is the self-perpetuation of power, which is to be achieved at the expense of maximizing the state welfare and is "an objective that precludes a truly effective and independent judiciary").

111 Haibo, "Litigations without a Ruling," 267.

112 Eric C. Ip and Kelvin Hiu Fai Kwok, "Judicial Control of Local Protectionism in China: Antitrust Enforcement against Administrative Monopoly on the Supreme People's Court," *Journal of Competition Law & Economics* 13, no. 3 (2017): 560, 569, https://doi-org.proxy-ub.rug.nl/10.1093/joclec/nhx018 (observing that the Chinese judicial system is highly motivated in tackling local administrative monopolies but is reluctant to tackle central ones, for the fear of potential political backlash in the party-state ecosystem).

confidence in judicial review. Secondly, in the rare cases where an enforcement decision was brought before a court, the observed level of judicial deference is so high that whether effective judicial supervision exists becomes questionable. The zero plaintiff "win" rate does not help remove this doubt. Also, if the reluctance to sue were indeed due to the low confidence in judicial supervision, then the rarity of AML administrative litigations as such is indicative of the (perceived) level of judicial supervision.

3.2 The Requirement of Self-Evaluating the Competitive Impact of Abstract Administrative Actions

While external (judicial) constraints are virtually lacking, there is still an internal constraint—at least on paper—on the agencies: the policy requirement of "establishing a fair competition review system".

On June 1, 2016, the State Council issued a policy document titled "the Opinion on Establishing a Fair Competition Review System during the Development of Market-oriented Systems" (hereinafter, "Opinion").[113] This Opinion declares the Chinese central government's determination to safeguard market competition by means of delineating the boundaries of governmental intervention in market supervision. To that end, it introduces a requirement upon the governmental agencies at all levels to self-evaluate their abstract administrative measures regarding those measures' interferences with market competition. More specifically, this Opinion declares that, from July 2016 onwards, administrative measures with a restrictive impact on competition should not be adopted; administrative measures without such a prior self-evaluation should not be adopted either. It stipulated eighteen specific criteria for the self-evaluation, and these criteria are categorized as four standards:

(1) The impact on market entry and exit;
(2) The impact on the free movement of goods and other elements;
(3) The impact on undertakings' operation costs;
(4) The impact on undertakings' operational behavior.

Presumably, this self-evaluation requirement would constrain the agencies internally. However, it remains to be seen how much strengthen this policy really has, since so far there are no normative mechanisms for the implementation of this policy.[114]

113 The State Council, *The Opinion on Establishing a Fair Competition Review System during the Development of Market-oriented Systems* (国务院关于在市场体系建设中-建立公平竞争审查制度的意见 国发[2016]34号), June 1, 2016, http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm (in Chinese) (accessed November 10, 2018).

114 Yong Huang and Baiding Wu, *China's Fair Competition Review: Introduction, Imperfections and Solutions*, CPI Antitrust Chronicle, March 15, 2017, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/03/CPI-Huang-Wu.pdf (accessed November 10, 2018).

4 The Parallel Track of Private Enforcement

4.1 The Legal Basis

Art 50 of the AML provides the legal basis for civil litigations against undertakings infringing the AML. As it states,

> Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.

In 2012, the Supreme People's Court issued a Judicial Interpretation to clarify the issues relating to the AML's application in civil litigations.[115] This Judicial Interpretation has been the primary legal basis for private AML enforcement to date.

4.2 The Enforcement Records

Right after the AML came into effect, civil litigations began to emerge. When issuing the AML Judicial Interpretation, the Supreme Court disclosed that, by the end of 2011, there were sixty-one AML civil cases filed and fifty-three closed across the nation.[116] It also disclosed that the majority of those cases were abuse of dominance cases, and that the winning rate of the plaintiffs was very low. The Supreme Court attributed this low winning rate to the heavy burden of proof on the plaintiffs. It was observed that the number of civil cases under the AML was continuously rising. The reported numbers are listed as follows:[117]

115 Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (最高人民法院《关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》), issued by the Supreme People's Court on May 3, 2012, effective on June 1, 2012, https://www.chinacourt.org/law/detail/2012/05/id/145752.shtml (in Chinese) (accessed November 10, 2018) (hereinafter, "the AML Judicial Interpretation"). For some English introductions of the AML Judicial Interpretation, see King & Wood Mallesons, *The Dual System of Anti-Monopoly Law – The Interplay between Administrative Enforcement and Civil Action*, China Law Insight, September 12, 2013, https://www.chinalawinsight.com/2013/09/articles/corporate/antitrust-competition/the-dual-system-of-anti-monopoly-law-the-interplay-between-administrative-enforcement-and-civil-action/ (accessed November 10, 2018); Sébastien J Evrard, *Civil Antitrust Litigation in China*, May 12, 2016, https://www.gibsondunn.com/wp-content/uploads/documents/publications/Evrard-Civil-Antitrust-Litigation-in-China-Competition-Law-International-5-12-16.pdf (accessed November 10, 2018).

116 Xinhua New Agency, *The Supreme Court Answers Journalists' Questions regarding the Nation's First Judicial Interpretation for Anti-Monopoly Trials* (最高法就我国第一部反垄断审判司法解释答记者问), The State Council Website, May 8, 2012, http://www.gov.cn/jrzg/2012-05/08/content_2132662.htm (in Chinese) (accessed November 10, 2018).

117 See Zhang Hongbing, *Ten Years after the Adoption of the AML: Hardening "Three Teeth" to Siege Administrative Monopolies* (反垄断法颁布十年: 磨硬"三颗牙齿" 合围行政垄断), Jurisprudence Daily, August 31, 2017, https://www.chinacourt.org/article/detail/2017/08/id/2986162.shtml (in Chinese) (accessed November 10, 2018). No official disclosure of these numbers can be found, but this news report suggested that there was one. There was no mentioning of the numbers of 2016 and 2017 in this news report.

Table 4. The AML civil cases filed each year from 2008 to 2015

2008-2009	2010	2011	2012	2013	2014	2015
10	33	18	55	72	86	156

4.3 The Duality of the Enforcement Tracks and the Ensued Institutional Dynamics

Having a track of private enforcement parallel to public enforcement is common. For example, such a dual-track setting is present in both the EU competition law regime and the US antitrust regime.[118] The idiosyncrasy of the AML regime is that, against the backdrop of this dual-track setting, the public enforcement agencies are subject to almost no judicial supervision. Consequently, a unique set of institutional dynamics comes into being between the enforcement agencies and the courts in the AML context.

On the one hand, the tripartite enforcement agencies (since March 21, 2018, the consolidated SAMR and its local agencies) are to a great extent free from the constraints of judicial review. Consequently, the hierarchical control (by administrative superiors) takes the place of judicial supervision.[119] In that event, the agency discretion (in carrying out the enforcement responsibilities) is significantly expanded—at least from an institutional structure perspective, since the internal structuring of the State Council is based on technocracy.[120] Provided that this superior control does not lose its grip, two possible scenarios will ensue:

- On the upside, when the higher command defers to the agency discretion, the SAMR—as the public enforcer of a young competition law regime in a developing country—will be facilitated to develop more technocracy and to shape the AML application to meet the regime-specific antitrust demands.[121]
- On the downside, when a deferential atmosphere ceases to exist, the SAMR's exercise of discretion will to a large extent be controlled by political influences that

118 Notably, the significance of private enforcement in these two regimes differs. The EU has been facing limited number of private enforcement cases over the years despite its efforts to boost private enforcement at the Member State level. Meanwhile in the US, the number of private antitrust actions has been increasing to a point that the judiciary tends to discourage such actions. See Loannis Lianos and Arianna Andreangeli, "The European Union," in Fox and Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices*, 404 (describing the limited number of private enforcement cases in the EU and the likeliness of increase in the future); cf. Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011), 57–62, https://doi.org/10.1093/acprof:oso/9780195372656.001.0001.

119 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," 61–62 (describing hierarchical control as one of the three mechanisms—besides obedience-internalization and judicial supervision—for a power-delegating principal to supervise a delegated agent, and suggesting that one of the multiple ways to exert that control is demanding the promulgation of internal rules for exercising the agency discretion).

120 Shih, *Factions and Finance in China*, 5, 54.

121 Yane Svetiev and Lei Wang, "Competition Law Enforcement in China: Between Technocracy and Industrial Policy," *Law and Contemporary Problems* 79, no. 4 (2016): 191–94.

> flow in via the administrative chain of command. Those political influences would be unaccountable, due to the absence of a third-party (judicial) check. They would undermine to a further extent the agency independence and thus perpetuate inadequate and opportunistic enforcement.[122]

Either way, the issue lies in whether the administrative control should (and if yes, to what extent) defer to the agency discretion. Since the (second-party) control by administrative superiors acts in replacement of the judicial (third-party) control in the case of the AML,[123] this issue goes beyond the narrow discussion of "whether the agency's performances have warranted a certain level of deference"; it relates to a much wider topic of policy-agenda setting. Taking that into account, this dissertation focuses on the narrow discussion: in Chapter 6, it reviews the agencies' performances regarding their productions of theories of harm in individual cases.

On the other hand, when virtually relieved from the duty to supervise administrative agencies, the High Courts and the Intermediary Courts play only the role of adjudicator on private AML suits. In that event, they become "competitors" of the public enforcement agencies when it comes to interpreting the law and clarifying legal issues. Technically, this also applies to the Supreme Court, but it should be noted that the Supreme Court sometimes performs legislation-equivalent functions: it adopts Judicial Interpretations, the disobedience of which could cause too much political risk for the enforcement agencies. Therefore theoretically speaking, the institutional dynamics would be more nuanced when the Supreme Court is involved.

In any event, the exact institutional dynamics between the agencies and the courts remain to be seen in individual cases. Following the steps of this chapter, Chapter 6 discusses such institutional dynamics and their impact in a selection of cases. It does so by using the concept of theory of harm as a vantage point. But before that, Chapter 5 shifts the focus back to the EU regime: it looks at the production of theories of harm in the EU regime and the underlying institutional dynamics based on the institutional descriptions in Chapter 3.

122 Yan "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 144.

123 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," 61–63 (characterizing the two external control mechanisms for a principal on its agent as second-party hierarchical control and third-party control).

THE PRODUCTION OF THEORIES OF HARM UNDER ARTICLE 102 TFEU

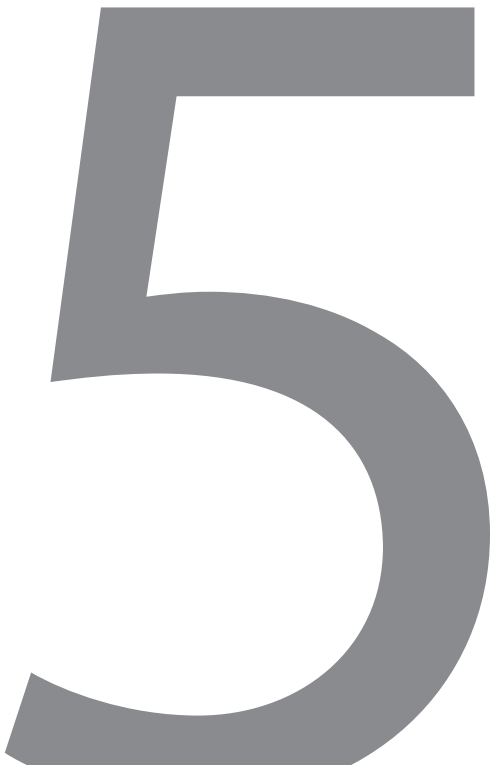

Table of Contents

1 The Market Integration Mandate

As mentioned in Section 1.3 of Chapter 2 of this dissertation, the production of theories of harm under the Treaty provision of Art 102 TFEU has essentially two sources of input: economic theories and policy mandates. The economic theories underpinning Art 102 are described (as several schools of thought) in Section 1.3 of Chapter 2 of this dissertation. This section looks at the second source of input. It focuses on one of the most prominent policy mandates of the EU: market integration.

1.1 A Key Imperative of the EU

Market integration is an omnipresent imperative embedded in the EU legal framework.[1] This imperative was originally expressed as the establishment of a Common Market in Art 3 of the EEC Treaty. According to the ECJ, it means "the elimination of all obstacles to intra-Community trade in order to merge national markets into a single market bringing about conditions as close as possible to those of a genuine internal market".[2]

Market integration could be understood as consisting of two aspects. The first one is negative integration, meaning that existing obstacles to Community integration should be removed. Negative integration was the primary task of the EC throughout the 1960s and the 1970s.[3] The highlight was the *Casis de Dijon* case,[4] in which the ECJ upheld the free movement of goods within the EC. The second aspect is positive integration, meaning the EU legislature (the Council and the European Parliament) should adopt affirmative policies to encourage trade between the Member States.[5] The need to proactively regulate the Common Market came about after the significant progress in terms of negative integration in the 1970s, and it persisted from the mid-1980s to mid-1990s.[6]

1 Claus-Dieter Ehlermann, "The Contribution of EC Competition Policy to the Single Market," *Common Market Law Review* 29, no. 2 (1992): 257 ("With the entry into force of the Single European Act, the Single Market exercise was enshrined with 'constitutional' force in the Treaty itself"). See also, Norbert Reich, Annette Nordhausen Scholes, and Jeremy Scholes, *Understanding EU Internal Market Law*, 3rd ed. (Cambridge, United Kingdom: Intersentia, 2015), 3–4 (highlighting the significance and the uniqueness of the *internal market* objective in the EU system).

2 Case 15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, para 33.

3 Reich, Nordhausen Scholes, and Scholes, *Understanding EU Internal Market Law*, 5–6.

4 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

5 Barry E. Hawk, "Antitrust in the EEC - The First Decade," *Fordham Law Review* 41, no. 2 (1972): 231.

6 T. Koopmans, "The Role of Law in the Next Stage of European Integration," *International and Comparative Law Quarterly* 35, no. 4 (1986): 926–27; Rein. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford: Hart Publishing, 2000), 59–60.

The integration mandate was accentuated in the Single European Act in 1987. The expression of internal market replaced the old expression of Common Market. Based on the 1985 Commission White Paper, which proposed to establish an internal market by the end of 1992 and suggested various measures to achieve that goal,[7] the Single European Act revised the EEC Treaty provisions, and defined the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital it ensured in accordance with the provisions of this Treaty".[8] To that end, a qualified majority voting system was introduced. It expanded the Council's legislative power for adopting "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".[9] This definition of internal market and the supranational power created under this mandate has since been kept in place, as stipulated respectively in Art 26(2) and Art 114(1) of the TFEU.

1.2 Market Integration and EU Competition Law

To understand the relationship between the market integration mandate and EU competition law, it is necessary to briefly clarify three points.

First of all, the EU has multiple layers of legal objectives. In that regard, the market integration mandate could be seen as an intermediary that links the fundamental values of the EU with the envisaged functions of the EU competition law regime. As provided in the preamble and Art 3 of the TEU, fundamental values overarching the EU legal framework include, *inter alia*, peace, freedom, economic prosperity, and social progress. Market integration as a more specific mandate is provided in Art 3(3) of the TEU, which states the aim of establishing an internal market, so as to achieve economic growth and other fundamental objectives enshrined in the founding Treaties.[10] One of the core methods to achieve such an internal market is the strict control on anticompetitive practices.[11] This method was stipulated in Art 3(f) of the EEC Treaty, and now it is in Protocol 27 of the TFEU, which states that the internal market includes "a system ensuring that competition is not distorted". In that sense, the mandate of market integration became an independent aim of EU competition law.[12] Or put in another way, competition law became an indispensable instrument to achieve

7 Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June1985), COM (85) 310.

8 Art 13 of the Single European Act, [June 29, 1987] OJ L 169, 1–28.

9 Ibid., Art 18.

10 Valentine Korah, "From Legal Form toward Economic Efficiency - Article 85(1) of the EEC Treaty in Contrast to U.S. Antitrust," *Antitrust Bulletin* 35 (1990): 1010; Reich, Nordhausen Scholes, and Scholes, *Understanding EU Internal Market Law*, 14.

11 Reich, Nordhausen Scholes, and Scholes, *Understanding EU Internal Market Law*, 11.

12 Ibid., 230; Korah, "From Legal Form toward Economic Efficiency," 1010.

integration.[13] This is exemplified by the wordings of Articles 101 and 102 TFEU, which use *incompatibility with the internal market* as the benchmark of illegality.

Secondly, as frequently highlighted in the relevant legal literature, market integration is not the sole objective, nor a fundamental one, of EU competition law.[14] Other prominent objectives include the protection of the competitive process, freedom of choice, non-discriminatory treatment of customers, efficiency, and welfare considerations.[15] Despite the multiplicity of objectives, the integration mandate has always been a key booster of EU competition law development.[16]

Thirdly, the interpretation of market integration is not static. For example, written in such a high level of generalization and flexibility, the two Treaty provisions that are now Articles 101 and 102 TFEU allowed the Commission and the CJEU to contemplate and to advance the antitrust jurisprudence relating to the integration mandate.[17] The evolving understanding of the integration mandate in the application of these two Treaty provisions is described in the following subsections. A key point is that, as the integration mandate was elaborated and developed further in the case law, it gradually became integrated with other competition law objectives, making the EU antitrust jurisprudence strongly market structure-oriented.[18]

1.3 Starting with Art 101: Market Integration as a Wider Context for Art 102

The influence of the integration mandate on Art 101 enforcement was the basis of its influence on Art 102. This is because by the time when Art 86 of the EEC Treaty (a preceding version of Art 102 TFEU) was activated in *Continental Can*, Art 85 of the EEC Treaty (a preceding version of Art 101 TFEU) had been enforced for thirteen years.

13 Ehlermann, "The Contribution of EC Competition Policy to the Single Market," 258–59 (explaining that the normative requirements and the entailed changes of the Single Market exercise made competition policy indispensable). See also, Heike Schweitzer and Kiran Klaus Patel, "EU Competition Law in Historical Context: Continuity and Change," in *The Historical Foundations of EU Competition Law*, ed. Kiran Klaus Patel and Heike Schweitzer (Oxford University Press, 2013), 208 (suggesting that from the start, "the evolution of European competition law was tied up with the Community's mission to create a common market"); Bergh, Camesasca, and Giannaccari, *Comparative Competition Law and Economics*, 113–14 (questioning the appropriateness of market integration as a goal of competition law).

14 Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004), 14 ("It is probably safe to say that competition was not an end in itself, but was intended as a way to promote economic progress and the welfare of European citizens.").

15 See for example, Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011), 14–49.

16 Michelle Cini and Lee McGowan, *Competition Policy in the European Union*, 2nd ed. (Palgrave Macmillan, 2009), 32–33 (seeing the swift installation of state aid policy and merger control policy in the late 1980s and 1990s as an exemplification of this point).

17 Motta, *Competition Policy*, 14 ("It is difficult to see exactly what the objectives of competition policy were for those who drafted the Treaty of Rome"); Reich, Nordhausen Scholes, and Scholes, *Understanding EU Internal Market Law*, 224 (pointing out that Articles 101 and 102 "are phrased in sufficiently general terms as to be capable of bearing very different practical meanings at different times and in different circumstances").

18 Sigfrido M. Ramírez Pérez and Sebastian van de Scheur, "The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]," in Patel and Schweitzer, *The Historical Foundations of EU Competition Law*, 43–44.

Anticompetitive agreement regulation was the first activated segment of EU competition law.[19] The market integration mandate prompted that activation. When Regulation 17/62 was adopted to break the ground for antitrust enforcement, trade barriers were pervasive, threatening the very existence of the EEC.[20] The need to break down those market barriers resonated with the antitrust rationale of prohibiting anticompetitive agreements.[21] In that event, Art 85 of the EEC Treaty was perceived as a powerful instrument for the negative integration of the internal market.[22] During the thirteen years when Art 85 was applied and Art 86 of the EEC Treaty was not, there were two cases worth particular mentioning.

1.3.1 Société Technique Minière (1966)

This was a preliminary ruling case about the applicability of Art 85 to exclusive distribution agreements. Based on the wording of Art 85(1), the ECJ forged the overall effects-centric assessment as two layers of consideration: "effects on trade between Member States" and "effects on competition".[23]

The first layer of consideration is first and foremost a jurisdictional threshold: it requires an effect on "trade between Member States" for a practice to trigger the application of Art 85(1).[24] On top of that, the ECJ stated that this consideration also means a cocern for "a possibility that the realization of a single market between Member States might be impeded".[25] With this statement, the ECJ effectively incorporated the market integration mandate in the first layer of consideration. In other words, the ECJ construed the first layer of consideration substantively as the examination of whether it is possible "to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".[26] As the ECJ stated,

> [I]t is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.[27]

19 Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Cheltenham, UK: Edward Elgar, 2010), 123–24; Cini and McGowan, *Competition Policy in the European Union*, 21–22 ("During the early 1960s, European competition policy was synonymous with restrictive practices (including cartel) policy.").

20 Korah, "From Legal Form toward Economic Efficiency," 1011.

21 McGowan, *The Antitrust Revolution in Europe*, 31–32.

22 Caroline Heide-Jorgensen, "The Relationship between Article 101(1) TFEU and Article 101(3) TFEU," in *Aims and Values in Competition Law*, ed. Caroline Heide-Jorgensen et al. (Copenhagen: DJØF Publishing, 2013), 97–98.

23 Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235, 248.

24 Ibid., 249.

25 Ibid.

26 Ibid.

27 Ibid.

1.3.2 Consten and Grundig v Commission (1966)

This was also an exclusive distributorship case. In 1964, the Commission issued the *Grundig-Consten* decision. This decision prohibited the exclusive distribution agreement between producer Grundig and its French distributor Consten, along with an assisting trademark licensing agreement.

In its verification of the Union-dimension requirement stipulated in Art 85(1), the Commission revolved around the integration mandate. As it stated, the exclusive distribution agreement, along with the trademark licensing, prevented other undertakings in France from importing Grundig products; it also prevented Consten from reselling Grundig products to other Member States.[28] The Commission deemed the price difference between the French and the German markets as clear proof of the Common Market being undermined. In that regard, the fact that cross-State trade was increasing could not justify the negative impact of the agreement on Community trade.[29]

When the Commission decision was appealed to the ECJ, the Advocate General of the case held the opinion that it was not enough for the Commission to interpret the impact on Union-trade merely as a jurisdictional threshold.[30] The AG considered that, under the correct guidance of the market integration mandate, the Commission should have performed a more substantive and nuanced assessment "on its own initiative".[31] In that regard, he raised a few points on how an exclusive dealership, as a form of vertical product-integration, could potentially benefit Community-market integration.[32]

In the appeal judgment, the ECJ discarded the AG's suggestion of performing a more nuanced assessment. Instead, it approved the Commission's subjecting the "effect on trade between Member States" consideration to a low standard of proof. The underlying logic of the ECJ was that market integration was an objective of Art 85. As it stated,

> The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85 (1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.[33]

28 64/566/CEE: Décision de la Commission, du 23 septembre 1964, relative à une procédure au titre de l'article 85 du traité (IV-A/00004-03344 «Grundig-Consten»), [October 20, 1964] OJ 161, 2548.

29 Ibid., 2549.

30 Opinion of Mr Advocate General Roemer (delivered on April 27, 1966) in Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299, 360.

31 Ibid., 361.

32 Ibid., 360–61.

33 Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299, 340.

As the ECJ in *Continental Can* stated that "Articles 85 and 86 seek to achieve the same aim on different levels",[34] it came as no surprise that the enforcement practice under the Treaty provision that is now Art 102 TFEU developed in accordance with the same integration mandate underpinning the practice under the Treaty provision that is now Art 101 TFEU.[35] However, it is notable that as the establishment of the Common Market progressed, the integration mandate was taken into account in the enforcement under Art 102 more and more comprehensively. This is demonstrated in the case analyses in Section 2 and summarized in Section 3.2.

2 Theories of Harm under Article 102 TFEU

2.1 The Selection of Cases

As described in Chapter 3 of this dissertation, a prominent feature of the EU competition law enforcement regime is that the Commission assumes the central role for public enforcement under the judicial supervision of the CJEU. Against this institutional background, it is worth discussing whether and to what extent the institutional dynamics between the Commission and the CJEU, which are defined by their instutional responsibilities, have impacted the enforcement outcomes. This dissertation contributes to that discussion, but limits the scope of the enforcement outcomes to the legal reasoning in the enforcement decisions. In that regard, Chapter 2 of this dissertation introduces the concept of theory of harm for the purpose of critically describing such legal reasoning. This concept is intended to accentuate the conceptions and elaborations of "anticompetitiveness" by the two institutional actors in the enforcement cases they handled.

As mentioned in Section 2 of Chapter 1 and Section 1.3.5 of Chapter 2, this dissertation hypothesizes and seeks to verify the impact of institutional dynamics—ensued from the respectively entrusted institutional functions—on the production of theories of harm in a legal regime. Regarding this hypothesis, two questions emerge:

(1) Through what channels is that impact exerted?
(2) What are the "ingredients" for that production?

These two questions are essentially the same question posed from two different perspectives: different institutions can put different emphases on the "ingredients" of production and thus produce different theories of harm. As discussed in Section 1.3 of Chapter 2 and Section 1 of this Chapter, there are essentially two types of ingredients for producing a theory of harm: economic theories and policy considerations.

34 Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, para 25.

35 Ehlermann, "The Contribution of EC Competition Policy to the Single Market," 261.

To test the abovementioned hypothesis in the EU context, this section selects a number of cases as study samples. These cases consist of two categories: (1) annulment cases challenging an enforcement decision by the Commission before the CJEU, and (2) preliminary ruling cases brought by the Member State courts before the ECJ.

The selection of cases under the first category is based on one central consideration: a case of this kind should involve both the Commission and the CJEU, thus providing the platform for identifying and comparing the legal reasoning of the two institutional actors. Consequently, only Commission decisions that were appealed (either once to the GC or further to the ECJ) are considered, and Commission decisions that were not judicially challenged are excluded.

The selection of cases under the second category is based on the consideration that a case of this type should be able to provide an opportunity for observing how the CJEU reasons when the Commission is not taking the initiative in case handling. When a CJEU judgment is being described, the Advocate General's opinion attached to that judgment is also described if it contains points that pertain to the production of theory of harm at hand. Such points could either be taken into account or disregarded by the CJEU. The selection of these two types of cases also takes into consideration the choices made in previous academic studies.[36]

After being selected, these cases are classified according to the types of abusive conduct they contained. The theories of harm in these cases are critically described, with a focus on their internal consistency of logic and the degree to which they make economic sense (as mentioned in Section 2.4.1 of Chapter 2). In the event that a case contained multiple types of abusive conduct, it is divided into segments and presented each time in a subsection that addresses a type of conduct relevant to it.

2.2 The Activation of Article 102

2.2.1 More than a Decade of Dormancy (1958–71)

In 1958 when the EEC Treaty was signed, a provision governing abuse of dominance, namely Art 86, was incoporated, but the Commission kept this provision on the shelf for more than a decade. The reason was said to be the difficulty of formulating a clear doctrine[37] because of the vaguely stipulated concepts in that provision, including the requirement of the Common Market dimension, the notion of dominance, and the abuse

36 Anne C Witt, *The More Economic Approach to EU Antitrust Law*, Hart Studies in Competition Law, volume 14 (Oxford, United Kingdom: Hart Publishing, 2016), xxx (referring to a number of relevant Commission decisions and CJEU judgments to describe the concept of harm in the Art 102 application); Pablo Ibáñez Colomo, "The Law on Abuses of Dominance and the System of Judicial Remedies," *Yearbook of European Law* 32, no. 1 (January 1, 2013): 410 (drawing a diagram to introduce all the leading cases under Art 102 TFEU).

37 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 35.

thereof.[38] Consequently, the Commission was reluctant to pursue cases for the fear of being overturned by the ECJ because of a lack of a well-defined reasoning.[39]

To be fair, there were some attempts to launch the application of Art 86. For example, in 1965 a group of experts were put together to develop the principles and frameworks for the application of Articles 85 and 86 to mergers.[40] A report by these experts was published in 1966, but it yielded no promising results. It merely concluded that, to apply the concept of abuse, "a direct causal link was required between the enterprise's power and its results in the market", in addition to a violation of the Treaty objectives.[41] Moreover, against the pervasive fear that Art 86 would remain a dead letter,[42] the ECJ also began to encourage the filing of Art 86 cases. For example, in three cases between 1968 and 1971,[43] the ECJ implied that exercising intellectual property rights to raise price could constitute an abuse of dominance, as it stated that the price level of a product could be a decisive indicator of abuse of dominance when it is particularly high and is not justified by the facts.[44] Nonetheless, the ECJ's encouragement was limited to the scope of exclusionary abuses; it was very reluctant to intervene in cases concerning exploitative abuses.[45]

2.2.2 Art 86 Activated for Merger Control: Continental Can

The *Continental Can* case ended the dormancy of Art 86. On December 9, 1971, the Commission issued a decision prohibiting the acquisition of TDV by Continental (in association with its controlled undertaking, SLW). The Commission decided that Continental, by this acquisition, had infringed Art 86 of the EEC Treaty, on the ground that such an acquisition eliminated the competition still remaining in the market.[46]

38 I. Samkalden and I. E. Druker, "Legal Problems Relating to Article 86 of the Rome Treaty," *Common Market Law Review* 3, no. 2 (1966): 169.

39 David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 2001), 356.

40 Pérez and Scheur, "The Evolution of the Law on Articles 85 and 86 EEC," 35.

41 Gerber, *Law and Competition in Twentieth-Century Europe*, 357.

42 Samkalden and Druker, "Legal Problems Relating to Article 86 of the Rome Treaty," 162.

43 The three cases are listed as follows: Case 24/67 *Parke, Davis & Co v Probel* [1968] ECR 55; Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69; Case 78/70 *Deutsche Grammophon GmbH v Metro-SB-Grossmärkte* [1971] ECR 487.

44 Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69, para 17.

45 Peter Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position and Its Impact on Article 102 TFEU," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 9, 2015), 17, https://papers.ssrn.com/abstract=2658045 (accessed November 11, 2018) (observing that Art 86 of the EEC Treaty "has rarely been used by the Commission or the ECJ to 'micro-manage' dominant firms pricing strategies").

46 Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, 228 (hereinafter, "the ECJ judgment on *Continental Can*").

2.2.2.1 The Commission Decision's Theory of Harm

Concentration of Undertakings as a Type of Abuse

The Commission briefly explained the applicability of Art 86 to merger cases. After finding that Continental, as well as its controlled company SLW, was dominant in the relevant markets,[47] the Commission stated that, in *certain circumstances*, the action of a dominant undertaking to acquire a major share of a competing undertaking could constitute an abuse of dominance.[48] It considered such an acquisition would violate Art 86 if the following conditions were met:

- The acquisition is used to reinforce the dominant position;
- The acquisition will result in the elimination of the actual or potential competition at the current level;
- The markets concerned are a substantial part of the Common Market.

In other words, the Commission considered that a concentration would constitute an abuse if it were between a dominant undertaking and a competitor in the same market. The idea was that such a dominant position would entail a scale of competition-restriction that normal concentrations would not entail.[49]

Two Aspects of Harm

Explanations were needed as to why a seemingly benign practice, namely acquisition, could constitute an abuse when being implemented by a dominant undertaking. In that regard, the Commission alleged two aspects of harm of this acquisition: (1) the negative modification of market structure,[50] and (2) the restriction on actual or potential choices of users.[51]

The Commission alleged the first aspect of harm after finding that Continental and TDV were potential competitors across Member States.[52] On that basis, it alleged the second one: the potential competition between Continental and TDV could have the benefit of increasing user choices, but the merger would definitely erase that benefit.[53]

47 72/21/CEE: Décision de la Commission, du 9 décembre 1971, relative à une procédure d'application de l'article 86 du traité CEE (IV/26 811 - Continental Can Company), [January 8, 1972] OJ L 7, 37 (hereinafter, "the Commission decision on *Continental Can*").

48 Ibid.

49 The ECJ judgment on *Continental Can*, 229.

50 The Commission decision on *Continental Can*, 37.

51 Ibid., 38.

52 Ibid.

53 Ibid., 38–39.

2.2.2.2 The AG Opinion

The Advocate General ("AG") examined the Commission's reasoning on both aspects of harm. Although he did not expressly separate or sequence his analyses on these two aspects, it is possible to describe them from the following two aspects.

The Harm to Market Structure

In light of the case circumstances, the AG framed the concern for market structure more precisely as the following:

> [W]hether Article 86 also applies if an undertaking in a dominant position on the market, by means of the acquisition of another undertaking reinforces its position on the market, to such an extent that 'in practice' nothing remains in the way of competition of economic significance.[54]

In other words, the AG observed that what triggered the prohibition were the *anticompetitive outcomes* of a merger. On that basis, the AG dissected the Commission's harm rationale, first by suggesting that this rationale derived from two sources:

- Art 3(f) of the EEC Treaty, which ensured that "competition shall not be distorted in the Common Market",
- The requirement that there must not be an elimination of "competition in respect of a substantial part of the products in question" as stipulated in Art 85(3)(b) of the EEC Treaty.[55]

Subsequently, the AG suggested that the decisive question was "whether we are able to follow the Commission in these deductions".[56] To answer that question, he moved on to examining the second aspect of harm alleged by the Commission.

The Harm on User Choice

First, the AG specified the legal basis. Taking into account the fact that Continental did not use its market power as an instrument to realize the acquisition in question, the AG pinpointed the Commission's ground of decision to second paragraph (b) of Article 86,[57] which enumerated that an abuse of dominance may consist in "the limitation of production, markets or technical development to the prejudice of consumers".[58] The AG stated that, according to the Commission's view, this provision was applicable to this case because

54 Opinion of Mr Advocate General Roemer (delivered on November 21, 1972) in Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, 254 (hereinafter, "the AG Opinion on *Continental Can*").

55 Ibid.

56 Ibid., 255.

57 Ibid., 254.

58 Art 86 of the EEC Treaty (the Treaties of Rome).

it required a lesser extent of "the use of market strength" compared with the other three enumerating provisions.[59]

On that basis, the AG pointed out that, in an effort to extend the application of Art 86, the Commission was actually equating "the damage to consumer interest which occurs when competition ceases to exist" with "damage to the consumer consequent upon a limitation of production as a result of a dominant position".[60] The AG was of the opinion that the former, namely the limitation of consumer choices because of the diminishing of competitors, does not necessarily entail any competitive harm, and therefore has a much broader meaning than the latter.[61] In that light, he suggested that such an equation was an analogical application of law and ought to be prevented, considering the severity of penalty following the finding of abuse under Art 86.[62]

Therefore, the AG found the Commission's second harm rationale flawed. He advocated that, for the sake of the healthy functioning of the Community competition law regime, Art 86 should not be used to control mergers.[63]

2.2.2.3 The ECJ Judgment

The ECJ annulled the Commission decision, as advised by the AG. Notably, when examining the Commission's harm rationales, the ECJ paid more attention to the Commission's "harm to market structure" rationale than the AG did.

Validating the "Harm to Market Structure" Rationale

The ECJ started off with the premise that *measures altering the market structure* may very well constitute practices that anticompetitively affect the market within the meaning of Art 86, if the market power of a dominant undertaking were to be taken into account. As it stated,

> The distinction between measures which concern the structure of the undertaking and practices which affect the market cannot be decisive, for any structural measure may influence market conditions, if it increases the size and the economic power of the undertaking.[64]

59 The AG Opinion on *Continental Can*, 254.
60 Ibid., 255.
61 Ibid.
62 Ibid.
63 Ibid., 256.
64 The ECJ judgment on *Continental Can* (note 46 above), para 21.

The ECJ established this premise by resorting to a teleological interpretation of Art 86.[65] First, it traced the aim of Art 86 to Art 3(f) of the EEC Treaty, which "provides for the institution of a system ensuring that competition in the Common Market is not distorted".[66] On that basis, it held that Art 3(f) needed to be put into the comprehensive framework of Community tasks (as enumerated in Art 2 of the EEC Treaty), and to be balanced against other aims of the Common Market.[67] Secondly, it highlighted the parallelism of Articles 85 and 86. It held that, as two instruments installed simultaneously in the EEC Treaty concerning competition, Articles 85 and 86 were set out to achieve the same aim, and therefore one of them should never serve as a backdoor for escaping prohibition in the event of a practice being caught by the other.[68]

Reinforcing the Structural Conception of the Alleged Competitive Harm

Relying on these two teleological aspects of analysis, not only did the ECJ validate the Commission's *harm to market structure* rationale, it also put this rationale at the center stage of the abuse assessment. As it suggested, consumers' freedom of choice could be damaged not only directly by certain practices, but also indirectly by practices that have a negative impact on the market competition structure.[69]

In that sense, the ECJ downplayed the importance of the *harm to consumer choice* rationale in Art 86 assessment. This is in contrast with the AG opinion, which argued extensively that the precisely defined *consumer harm* in Art 86 (more specifically second paragraph (b)) was central for the application of Art 86 to conduct that does not involve the objectionable exercise of market power.[70] In fact, it can be said that the ECJ discarded altogether the AG's opinion that, by wording, Art 86 was not intended to catch conduct that strengthens an undertaking's market position.[71] This is evidenced by the ECJ's groundbreaking ruling that "the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved", if "the degree of dominance reached substantially fetters competition".[72]

65 Namely, the ECJ interpreted Art 86 of the EEC Treaty by looking into the legislative intent behind it. As it stated, "one has to go back to the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty". See ibid., para 22.

66 Ibid., para 24.

67 Ibid.

68 Ibid., para 25.

69 Ibid., para 26.

70 The AG opinion on *Continental Can*, 254–56.

71 Ibid., 256 ("It further follows from Article 86 that the Treaty will even accept the total absence of any competition", "because Article 86 clearly does not distinguish between different degrees of domination of the market and because it does not declare to be prohibited even an attempt at creating a monopoly situation").

72 The ECJ judgment on *Continental Can*, paras 26–27.

The implication of this ruling is that, to trigger the application of Art 86, a practice by a dominant undertaking would not have to be *objectionable as a manner of exercising market power*. Instead, it would only need to meet the requirement of altering the market structure to an extent that "seriously endangers the consumer's freedom of action".[73] The ECJ considered that to be the case when a merger eliminates practically all competition in the market.[74]

Accordingly, it could be said that the ECJ set a rather high standard of proof for this structural approach to establishing an abuse of dominance. As the ECJ stated, the Commission "had to state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight".[75] Pursuant to this standard, the ECJ found that the Commission failed to present enough findings and assessments to support its conclusion and so the decision should be annulled.[76] Therefore, although the ECJ chose a path different from the one advised by the AG, it nonetheless reached the same conclusion on the validity of the Commission decision as the AG's.

2.3 The Implication of Establishing Dominance for Finding Abuse

2.3.1 The Omitted but Equally Important Dominance Examination

This chapter analyzes how the Commission and the CJEU construct the theories of harm in their efforts to prohibit dominance-abusing practices under Art 102 TFEU. Naturally, the focus of this chapter is on abusive conduct, which is presented in categories in the following subsections. However, this does not mean that finding dominance is in any way less important. In fact, in the "abuse of dominance" paradigm, establishing a dominant position is prerequisite for assessing the abusiveness of a practice in question; moreover, a finding of dominance has significant implications for the subsequent abuse examination. The most important implication is the "special responsibility" concept entailed from a finding of dominance.

Since the concept of theory of harm is related more to abuse than to dominance (as discussed in Section 1.1 of Chapter 2), this chapter does not discuss in great detail the issues pertaining to finding dominance. However, before diving into the case analyses of the various types of abuses, it is necessary to highlight the special responsibility concept as a reminder of the importance of the prerequisite dominance assessment. Notably, this concept was not established at the beginning of the case law development, but that does not undermine the crucial role it plays in abuse assessments (and thus the theory of

73 Ibid., para 29.
74 Ibid.
75 Ibid.
76 Ibid., para 37.

harm constructions), as it channels the overarching concerns for market structure into the anticompetitiveness assessments.

2.3.2 The "Special Responsibility" Concept

The special responsibility concept was formally established in *Michelin I*, an annulment case concerning rebates that were alleged to be loyalty inducing. Notably, when it comes to the special responsibility concept, *Michelin I* should be read in conjuction with the cases that were adjudicated before and after it. Following the structural emphasis in finding dominance in the preceding cases, the ECJ in this case introduced the special responsibility concept. The introduction of this concept can be described as the following three steps in the dominance-finding part of the ECJ's judgment.

First, by identifying Art 3(f) of the EEC Treaty as the "general aim" of Art 86, and by interpreting that aim as "the institution of a system ensuring that competition in the common market is not distorted",[77] the ECJ seems to have offcially confirmed that the objective of Art 86 was *the preservation of a competitive structure*. The word choice of "institution" indicated that the level of competition was not optimal yet at that time, so there was a need to *foster* competition, by for instance breaking down trade barriers; it thus associtated the aim of Art 86 with the market integration mandate.

Secondly, the ECJ followed the definition of dominance as "a position of economic strength" as established in *Hoffmann-La Roche*[78] and *United Brands*.[79] Subsequently, it stated that Art 86 "prohibits any abuse of a position of economic strength" enjoyed by a dominant undertaking.[80] This could be interpreted as the ECJ construing abuse as *the exercise of market power held by a dominant undertaking*, therefore dismissing AG Reischl's argument in *Hoffmann-La Roche*,[81] and addressing the unclear link between abuse and dominance in the *Hoffmann-La Roche* judgment.[82]

Thirdly, the ECJ established the *special responsibility* concept. In an effort to dismiss Michelin's contention that it was being punished for having superior performances, the ECJ made the following statement:

77 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, para 29 (hereinafter, "the ECJ judgment on *Michelin I*").

78 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, para 38.

79 Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, para 65.

80 The ECJ judgment on *Michelin I*, para 30.

81 Opinion of Mr Advocate General Reischl (delivered on September 19, 1978) in Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, 583 ("the criterion is not the exercise of market power but that there is abuse where an undertaking in a dominant position influences the structure of competition by its acts").

82 See the text accompanying and following note 495 below.

> A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.[83]

The special responsibility concept can be understood as the legal implication of a dominance finding. Judging by its wording, this concept is built upon the emphasis on the structural preservation of competition. However, it is not entirely clear thus far as to exactly what legal implications this concept entails. For example, the following questions could be asked:

- Whether this concept means a dominant undertaking is prohibited from carrying out certain conduct that would be acceptable when carried out by non-dominant undertakings?
- If yes, what kind of conduct? If no, what else does it mean?

This judgment provided no precise answers to these questions. These questions were already looming in some cases before *Michelin I* and were present in some cases after *Michelin I*. Arguably, they have not been answered satisfactorily thus far. This is shown in the following subsections, which look at the abuse examinations on various types of conduct by the Commission and the CJEU.

2.4 Restriction of Resale

2.4.1 Suiker Unie

In this case, the Commission found three undertakings to have committed abuses of dominance: (1) RT, for obliging two dealers (Export and Hottlet) to resell sugar only to certain clients and only for certain uses in the Belgium and Luxembourg sugar markets;[84] (2) SU and CSM, for obliging three dealers to conclude a trade-restrictive agreement in the Dutch sugar market;[85] (3) SZV in the southern German market for first, obliging its agents not to sell sugar supplied by non-SZV sources without its consent, and secondly, granting fidelity rebates to its clients.[86] Two types of abusive conduct were present: restriction of resale and loyalty rebates. This subsection discusses the first type.

83 The ECJ judgment on *Michelin I*, para 57.

84 73/109/EEC: Commission Decision of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV/26 918 - European sugar industry), [May 26, 1973] OJ L 140, 38 (hereinafter, "the Commission decision on *Suiker Unie*").

85 Ibid., 38–39.

86 Ibid., 39.

2.4.1.1 The Commission's Theory of Harm

A Central Concern for Market Integration and a Harm Presumption based on Purposes

The alleged harm was the impediment to market integration. The Commission's harm analyses were rather brief and theoretical. It construed the harm from two aspects:

- Having the *aim* of limiting "the principal sources of supply" of these dealers;
- Having the likeliness of impairing the Common Market by restricting cross-Member State sugar sales.[87]

No further harm analysis was provided.

2.4.1.2 The AG Opinion

The Concern for Cross-Community Trade and a Lack of Harm Analysis

The AG agreed with the Commission's finding of abuse and confirmed the following logic: holding a dominant position means the possession of market power,[88] and by exercising such market power in the manner of pressuring its buyers to restrict their sources of supply, RT infringed Art 86.[89] According to that logic, one could infer a distinction between *possessing (but not exercising) market power* and *exploiting such market power*, as the latter being the prosecutable one.

In an effort to clarify the harm rationale underlying that logic and thereby substantiate the accusation that RT "restricted, if it did not eliminate, competition in the Belgian sugar trade", the AG resorted to the examples of abuse stipulated in Art 86, and suggested that RT's conduct had the harm of (1) imposing unfair trading conditions on its buyers, and (2) limiting the supply of sugar.[90]

However, there was one piece missing: pressuring the Belgian sugar distributors to restrict their sources of supply would not necessarily result in anticompetitive outcomes, in the sense that RT might very well have to maintain the price at a competitive level (thus indicating the existence of inter-brand competition). Therefore, by *not* examining whether and to what extent the output foreclosure of RT's competitors (caused by the restriction on the dealers' "sources of supply") in the Belgian market had indeed resulted in a lack of competition at the sugar-production level, the AG (and later the ECJ) might not really have

87 Ibid., 38–39.

88 Opinion of Mr Advocate General Mayras (delivered on June 16 and 17, 1975) in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1663, 2086 ("This situation enables it to act independently, to determine its policy without taking account of the operations of its competitors, buyers or suppliers on its market.") (hereinafter, "the AG opinion on *Suiker Unie*").

89 Ibid., 2086–87 ("The abuse of the dominant position emerges not only from the instructions given to Export and Hottlet, within the context of the sales policy which they had to adopt, but also from the methods employed by the applicant to make them fall in line.").

90 Ibid., 2089.

in mind a clear idea of competitive harm except for the restriction of market integration.[91] This could be partly exemplified by the fact that they tried to establish the abusiveness by referring to the abuse examples enumerated in Art 86, instead of engaging in harm analysis.

The abovementioned logic was also applied in the examination of the alleged abuse by SU and SCM. As stated by the AG,

> "When there is a dominant position which cannot be counteracted by competition, it is sufficient, in order to show that there has been an abuse […] that the undertaking holding this position 'uses it for purposes contrary to the objectives of the Treaty'."[92]

Regarding the harm at hand, the AG referred to second paragraph (c) of Art 86, namely the application of "dissimilar conditions to other trading partners and have thereby placed them at a competitive disadvantage".[93] However, no further harm analysis was performed regarding the competitive situation of the market where those discriminated trading partners operated.

2.4.1.3 The ECJ Judgment

Reiteration of the Integration Mandate and a Lack of Harm Analysis

The ECJ upheld the Commission's prohibition of the practice of RT. It referred to second paragraph (b) of Art 86 to allege the harm, namely the limitation of production.[94] It elaborated the harm in paragraph 401 when addressing the effect on trade between Member States: the practice in question "had an effect on the pattern of the deliveries which RT allowed dealers to undertake or prohibited them from undertaking in the Netherlands and in the western part of the Federal Republic of Germany". This was the only available harm elaboration in this judgment.

If this elaboration were to be understood as the ECJ's theory of harm on RT's conduct, it could hardly count as an explanation why the identified *limitation of production* was anticompetitive; it was merely a reiteration of the market integration mandate.

91 An alternative explanation is that the AG presumed the lack of competition between RT and other sugar producers based on the finding of dominance but did not ackenowledge that presumption. As the Commission stated, "For lack of other large sources of supply, the two dealers had to give into these pressures from the RT". See the Commission decision on *Suiker Unie*, 38.

92 The AG opinion on *Suiker Unie*, 2093.

93 Ibid.

94 Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1663, para 398 (hereinafter, "the ECJ judgment on *Suiker Unie*").

Moving on, the ECJ annulled the Commission's finding of infringement by SU and CSM, but only because the Commission failed procedurally to meet the standard of proof, not because it made substantive errors. Therefore the Commission's aim-based harm analysis revolving around the integration mandate was upheld.

The ECJ also annulled the Commission's finding of abuse regarding SZV's restriction of resale. There, it shed some light on the harm at hand, by indicating that the abusiveness should derive from the output-foreclosure of SZV's foreign competitors.[95]

Interestingly, just like the AG opinion, whenever there was a need for the ECJ to shed light on the theory of harm at hand, it tried to find legal grounds in the actual wording of Art 86, instead of engaging in a harm analysis. Therefore, it is difficult to infer what competitive harm the ECJ had in mind, except for a clear intention to defend market integration. This kind of elusiveness was not so different from the (lack of) reasoning of the Commission.

2.4.2 United Brands

This case concerned four types of dominance abuse by United Brands (UBC): restriction of resale, discriminatory pricing, excessive pricing, and refusal to supply. This subsection discusses the first one.

2.4.2.1 The Commission's Theory of Harm

A Consistent Concern for Market Integration and a Limited Harm Analysis

Regarding the restriction of resale, the Commission alleged two sets of harm:

- *The restriction of competition at the distribution level.* As stated by the Commission, the prohibition of resale prevented UBC's distributors and ripeners "from entering into competition at the resale level with UBC and the other importer/distributors".[96]
- *The undermining of the Common Market*, in the sense that the practice in question "amounts to a prohibition on exports and thus maintains an effective market segregation".[97]

No further explanation was provided on these allegations.

95 The ECJ judgment on *Suiker Unie*, para 486 ("clauses prohibiting competition imposed by an undertaking occupying a dominant position on trade representatives may constitute an abuse, if foreign competitors find that there are no independent operators who can market he product in question on a sufficiently large scale, […] or if the said undertaking enlarges the scope of the prohibition of competition to such an extent that it no longer corresponds to the nature of the legal and economic relationship in question").

96 76/353/EEC: Commission Decision of 17 December 1975 relating to a procedure under Article 86 of the EEC Treaty (IV/26699 - Chiquita), [April 9, 1976] OJ L 95, 13–14 (hereinafter, "the Commission decision on *United Brands*").

97 Ibid., 14.

2.4.2.2 The ECJ Judgment and the AG Opinion

A Primary Concern for Market Integration and a Limited Harm Analyses

The AG alleged two sets of harm at the beginning of his analysis:

- Restriction of competition (without specifying competition at which level), and
- Impediment to the economic freedom of distributors.[98]

On that basis, the AG examined the Commission's finding of abuse and offered more circumstantial considerations. First, he raised the question whether there was an actual or possible existence of resale among distributors, and found the answer to be affirmative.[99] In line with that logic, he identified the "horizontal intra-Community trade" to be the legal interest at stake.[100] Interestingly, this term could be linked to both *the integration mandate* and *sale competition at the UBC level*. In that sense, it seems that the AG also considered *the impediment to market integration* as an underlying source of harm of this abuse, in addition to the two allegations of harm.

The ECJ spelled out two sets of harm in paragraph 159 of the judgment:

- The first one was *the limitation of markets to the prejudice of consumers*, which was a direct reading of Art 86(b). No further harm analysis was provided.
- The second one was *the impediment to the Common Market*, by means of "partitioning national markets".[101] No further harm analysis was provided there either.

Another implied harm was *the restriction of freedom of the distributors to trade*. This could be found in the wording of paragraphs 157 and 160, where the ECJ ruled that this practice "confined the ripeners to the role of suppliers of the local market and prevented them from developing their capacity to trade *vis-à-vis* UBC", and therefore "is a restriction of competition".[102] However, it was unclear how this restriction of freedom could lead to a restriction of competition. In other words, the ECJ did not discuss if this restriction of freedom foreclosed UBC's competitors' output, or if this restriction of freedom inhibited UBC's distributors from engaging in competition at the distribution level. Therefore, the concern rested primarily on market integration.

98 Opinion of Mr Advocate General Mayras (delivered on November 8, 1977) in Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, 331 (hereinafter, "the AG opinion on *United Brands*").

99 Ibid., 332–33.

100 Ibid., 333.

101 Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, para 159 (hereinafter, "the ECJ judgment on *United Brands*").

102 Ibid., paras 157, 160.

2.5 Excessive Pricing

2.5.1 General Motors

2.5.1.1 The Commission's Theory of Harm

Market Integration as the Real Concern behind a Weak Theory of Harm

The practice in question was the excessive prices charged by GMC on the importers of five motor vehicles for the conformity inspection service that GMC provided. The Commission's reasoning was simple: after examining the case circumstances, the Commission found that "the extraordinary disparity between actual costs incurred and prices actually charged" constituted an abuse within the meaning of Art 86, particularly second paragraph (c).[103]

The alleged harm was *secondary-line distortion of competition*. As the Commission stated, the excessive price "acts to the detriment and unfairly discriminates against" those charged importers, and as a result, those importers "are disadvantaged to a disproportionately greater extent than appointed dealers".[104] On that basis, the Commission examined the subjective status of GMC, so as to verify the excessiveness of the prices in question.[105]

The solidity of this reasoning was questionable. Presumably, the anticompetitiveness of excessive pricing should be partly—if not all—about the exploitation of monopoly profits, but the examination on exploitation was nowhere to be found in this decision. This questionability was furthered by the Commission's allegation that GMC's excessive pricing also protected itself from competition, without any analysis on how that "primary-line distortion of competition" would come about.[106] However, by associating that primary-line injury with "parallel imports",[107] it seems that the Commission had an implicit concern for market integration, behind the concern for independent importers being disadvantaged.

103 75/75/EEC: Commission Decision of 19 December 1974 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851 - General Motors Continental), [February 3, 1975] OJ L 29, para 8 (hereinafter, "the Commission decision on *General Motors*").

104 Ibid.

105 Ibid., paras 10–11.

106 Ibid., para 13. The concept of "primary-line competition distortion" refers to the situation where the abusive conduct in question results in competition restriction in the market where the dominant undertaking operates. Meanwhile, the concept of "secondary-line competition distortion" refers to the situation where the abuse in question results in competition restriction in the market where the abuser's counterparties (such as customers) operate in. For introductions of these two concepts, see Eleanor M. Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness," *Notre Dame Law Review* 61, no. 5 (1986): 1008; Hans Zenger, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics* 8, no. 4 (2012): 741.

107 The Commission decision on *General Motors*, para 13.

2.5.1.2 The ECJ Judgment and the AG Opinion

Inhibition of Parallel Imports as the Underlying Harm of Excessive Pricing

The ECJ confirmed the existence of dominance based on the state-granted monopoly and the GMC's freedom to fix the service price.[108] On that basis, it identified the general harm of excessive pricing by a dominant undertaking as the *inhibition of parallel imports*.[109] This harm allegation was consistent with the ones made by the Commission and the AG.[110] Due to the lack of elaboration on how this inhibition of parallel imports could yield anticompetitive results in such case circumstances, it could be said that the ECJ also regarded market integration as the underlying concern, just like what the Commission did.

The ECJ annulled the Commission decision, as it found that GMC's excessive pricing was justified in those temporary circumstances[111] and was corrected soon after the undertaking adjusted to the new situation.[112] In that sense, the Commission's conception of harm of excessive pricing was not challenged.

Abuse as an Undermining of the Competitive Structure on Top of Dominance?

By annulling the Commission decision on factual grounds, the ECJ left unsolved the question whether an abuse is a *further* undermining of competition on top of a dominant position. This question was discussed in the AG opinion. According to the AG, the finding of dominance already "in itself implies a certain restriction of competition", and an abuse is a restriction of competition "to an even greater degree".[113] Under that premise, the AG *inferred* the excessiveness of the prices in question by relying mainly on circumstantial evidence, while ignoring the issues as to what extent they were excessive and on what grounds they could be justified.[114]

It is not difficult to detect the structural perspective underpinning the AG's reasoning, which suggested that a dominant position as such was a restriction of competition. However, by expressly stating that the abuse in question was a further undermining of the competitive structure, the AG's interpretation of Art 86 ended up attaching negative legal implications to the dominant status, despite claiming that dominance itself is not prohibited.[115] This reasoning was disputable, as it did not qualitatively distinguish the legal implications of

108 Case 26/75 *General Motors Continental NV v Commission of the European Communities* [1975] ECR 1367, para 9 (hereinafter, "the ECJ judgment on *General Motors*").

109 Ibid., para 12.

110 Opinion of Mr Advocate General Mayras (delivered on October 29, 1975) in Case 26/75 *General Motors Continental NV v Commission of the European Communities* [1975] ECR 1367, 1386 (hereinafter, "the AG opinion on *General Motors*").

111 The ECJ judgment on *General Motors*, para 21.

112 Ibid., para 22.

113 The AG opinion on *General Motors*, 1386.

114 Ibid., 1387.

115 Ibid., 1386.

finding dominance and finding abuse. In other words, it is questionable whether the harm of competition restriction could be established in the finding of dominance and prior to the examination of abuse. This is because, otherwise, there would be no need to perform any anticompetitive analysis under the two-tier paradigm of "dominance-abuse", and Art 86 might as well just apply *per se* prohibitions to particular types of conduct by dominant undertakings.

2.5.2 United Brands

2.5.2.1 The Commission's Theory of Harm

A Vague Allegation of Harm

Regarding the excessive pricing by UBC, the Commission made a vague harm allegation. Judging by its way of describing the excessive pricing practice as "charging unfair prices to certain of its distributors/ripeners",[116] it is possible that the Commission perceived the harm at hand to be *the violation of fairness of trade*. But even so, no further explanation was provided as to how the violation of fairness could be translated to competitive harm. It is also possible that the Commission considered the *loss of consumer welfare* as a source of harm of the excessive pricing, but there was no explicit reference to welfare of any kind in this decision.

2.5.2.2 The ECJ Judgment and the AG Opinion

Directing the Concern towards Exploitation

The ECJ annulled this finding of abuse by the Commission, but only because the latter failed to meet the standard of proof. Paragragh 249 of the judgment offers a glimpse of the ECJ's theory of harm:

> It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

In other words, the ECJ put forward a concern for *monopoly exploitation*. Accordingly, the issue became what would constitute such exploitation. In that regard, the ECJ's reasoning was ambiguous: while the ECJ in paragragh 249 suggested a causal link between "the insufficiency of competition in the dominated market" and "benefits that could be reaped", it seems to have set aside this link in paragraghs 250 ad 251. There, it just presumed that if a price is unreasonably high compared with the product value, that price should be deemed abusive without the need to ascertain whether it is a result of insufficient market competition.

Notably, the AG also discussed the issue of what would constitute excessive pricing. In that

116 The Commission decision on *United Brands*, 15.

regard, he dived into a quest for finding a normal price as the benchmark to prove the excessiveness of the prices in question.[117] However, this approach could be futile, because of the imperfect knowledge of the market.

2.5.3 DSD

2.5.3.1 The Commission's Theory of Harm

The Concerns for Monopoly Exploitation and Output-Foreclosure of Competition

This case concerned the imposition of "unfair prices and commercial terms" within the meaning of second paragraph (a) of Art 82 of the EC Treaty.[118] The relevant market was defined as the German market for "systems which exempt undertakings from their take-back and recovery obligations in respect of sales packaging".[119] DSD was found to be the only undertaking operating in that market, and dominant therein.[120]

DSD charged, under a Trade Mark Agreement, each customer a licence fee for all the packaging that was distributed by the customer and bore the "Green Dot trademark".[121] The Commission found this fee unreasonable. It pointed out that the fee was charged, not for the quantity of packaging making use of the exemption service provided by DSD, but for the quantity of packaging bearing the Green Dot mark, for which DSD bore minimal costs and had no justifiable grounds for charging fees.[122] Thus it considered that part of the price scheme to be an abuse of dominance.

The Commission alleged two sets of harm:

- *Monopoly exploitation*, in the sense that DSD imposed unfair prices within the meaning of second paragraph (a) of Art 82;[123]
- *Output-foreclosure of competition*, in the sense that the structure of and conditions for the license fees made it financially unappealing for DSD's customers to choose supplies of the competitors of DSD.[124]

117 The AG opinion on *United Brands*, 338–39.

118 2001/463/EC: Commission Decision of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/34493 — DSD), [June 21, 2001] OJ L 166, para 113 (hereinafter, "the Commission decision on *DSD*").

119 Ibid., paras 80, 91. There was a background to this case: For the purpose of avoiding packaging waste, the German government required manufactuers and distributors to recycle "used sales packaging" in two ways: "the self-management solution" and "the exemption system". The second way guaranteed regular collections of the used sales packaging. It was optional, but choosing it would save manufactuers and distributors from personally performing the recycle obligations in respect of all packaging covered by that system. Since 1991, DSD had been the only undertaking operating a Germany-wide exemption system. See Case T-151/01 *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities* [2007] ECR II 1607, paras 1–12 (hereinafter, "the CFI judgment on *DSD*").

120 The Commission decision on *DSD*, para 95.

121 The Commission decision on *DSD*, para 100.

122 Ibid., paras, 100, 111–12.

123 Ibid., paras 111–13.

124 Ibid., paras 114–15.

The Commission further described the abusiveness and particularly the foreclosure harm, using three groups of cases:

(1) "Restriction of competition between DSD and other exemption systems";
(2) "Restriction of competition between DSD and self-management solutions";
(3) "Restriction of competition between DSD and other exemption systems or self-management solutions". [125]

2.5.3.2 The CFI and ECJ Judgments

An Emphasis on the Foreclosure Harm

DSD appealed to the CFI, which issued the first instance judgment in 2007. The CFI found no factual or legal errors made by the Commission, and therefore upheld the Commission's finding of abuse.[126] Notably, in its examination of the abuse in question, the CFI shifted the focus from the exploitation harm to the foreclosure harm, as it hightlighted the possibility of competition being foreclosed and the unjustifiability of the prices.[127]

DSD then appealed to the ECJ, which issued the final judgment in 2009. The ECJ upheld the CFI's reasoning in respect of the dominance abuse.[128] Therefore, the two Courts approved the Commission's allegations of harm.

2.6 Discriminatory Pricing

2.6.1 United Brands

2.6.1.1 The Commission's Theory of Harm

An Unclear Conception of Harm

The Commission briefly assessed the discriminatory pricing of UBC. It relied on second paragraph (c) of Art 86 for alleging the harm: after stating that the discriminatory pricing placed certain distributors at a competitive disadvantage, the Commission swiftly concluded that competition was thereby distorted.[129] In that event, it is questionable as to exactly what kind of competitive harm was at stake. Namely, although alleging that UBC's discriminatory pricing placed certain distributors at a disadvantage, the Commission did not really engage in an examination as to what extent those distributors were competitively disadvantaged compared with their competitors in the other Member States.

125 Ibid., paras 117–35.

126 The CFI judgment on *DSD* (note 119 above), paras 119–65.

127 Ibid., paras 139, 163–64.

128 Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECR I 6155, para 143 (hereinafter, "the ECJ judgment on *DSD*").

129 The Commission decision on *United Brands*, 14.

Arguably, the harm that the Commission had in mind was once again *the impairment of the Common Market*. The following statement could exemplify this:

> For an undertaking in a dominant position, a policy of systematically setting prices at the highest possible level, resulting in wide price differences, cannot be objectively justified, particularly where that undertaking maintains market segregation.[130]

In an economic context where price discrimination is deemed as a benign response to customers' different willingness to pay, this statement does not make sense at all; but in the policy context of market integration, it becomes understandable.

2.6.1.2 The ECJ Judgment and the AG Opinion

Market Integration as the Real Concern

The ECJ's analysis on this abuse was very short. Consistent with the wording of Art 86(c), the ECJ considered the core harm to be *the impairment of market integration*, by stating that the discriminatory prices in question were "obstacles to the free movement of goods", and "[a] rigid partitioning of national markets was thus created at price levels".[131] In addition, it seemingly implied a supplementary harm of *interfering with the competition among distributors through discrimination*, as it stated that the discriminatory prices placed "certain distributors/ripeners at a competitive disadvantage".[132] Since no discussion was held on the competition between the distributors, the validity of this theory of harm was questionable.

The AG took a slightly different approach: instead of focusing on Art 86(c) as the Commission did, he was more concerned with *the exploitative nature* of the discriminatory pricing. As the AG stated, it is incomprehensible that "prices of an absolutely identical product in the same locality vary in the same week",[133] and the discrimination was aimed at preventing "ripeners from selling in Member States other than those where they have their installations by exploiting the price differences".[134] However, the AG did not further clarify the underlying competitive harm. It is possible that he had in mind the exploitation of consumer welfare, but then the issue would be whether the inexplicable price discrimination necessarily entails negative welfare results. In other words, without any further analysis on welfare, it would remain unclear as to whether the price discrimination was an indication that the market has been abusively exploited, or it was a benign way for the UBC to extract its production advantage. In any event, the AG, as well as the Commission, seems to have opted for the former account, but the ECJ did not adopt their approach.

130 Ibid., 15.

131 The ECJ judgment on *United Brands*, paras 232–33.

132 Ibid., 233.

133 The AG opinion on *United Brands*, 336.

134 Ibid., 337.

2.7 Predatory Pricing

2.7.1 AKZO

2.7.1.1 The Commission's Theory of Harm

In this case, the Commission found AKZO to have abused its dominance in the EEC market for organic peroxides.[135] The practice in question was the "aggressive price cutting" in the flour additives sector,[136] which was vital for ECS but of limited importance for its competitor in the organic peroxides market, AKZO. This practice was intended to prevent ECS from entering the market dominated by AKZO.

In this decision, the Commission showed some new decision-making developments, including the multiple references to academic articles and rules of other jurisdictions to support its own theory of harm,[137] and a high frequency of citing previous ECJ judgments.

Competition Foreclosure as the Core Harm

The Commission advanced *competition foreclosure* as the core concern. It adopted a strictly structural approach to the analysis, as it referred back to the *Continental Can* judgment and stated that "the strengthening of a dominant position held in a particular product market may constitute an abuse of that dominant position irrespective of the precise means adopted".[138] In fact, it could be observed that, at this point, a structure-oriented preservation of competition had become the default perspective for analyzing the harm of competition foreclosure. This was exemplified by the routinized references to Art 3(f) of the EEC Treaty and to the objective conception of abuse.[139] This structural approach also accounted for the fact that AKZO carried out the alleged abuse in a market different from the one in which it was found dominant.[140]

The harm of competition foreclosure was accentuated in the Commission's effort to establish a general rule on the applicability of Art 86 to exclusionary practices. In paragraph 67, the Commission referred to *Hoffmann-La Roche* to clarify that a dominant position could be manifested not only as the ability to *exploit*, but also the ability to *exclude*.[141] Moreover, as it stated in paragraph 74,

135 85/609/EEC: Commission Decision of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698 - ECS/AKZO), [December 31, 1985] OJ L 374, para 71 (hereinafter, "the Commission decision on *AKZO*").

136 Ibid., para 62.

137 Ibid., paras 76, 79.

138 Ibid., para 62.

139 Ibid., paras 73–74.

140 Ibid., paras 62, 85.

141 Ibid., para 67. The Commission was arguably wrong when it perceived *Hoffmann-La Roche* as a case "where the infringement of Article 86 involved primarily the exploitation of customers", since the types of harm enunciated in that judgment included more than just the exploitation of customers. Nonetheless, this mistake does not invalidate the point clarified by the Commission.

> Any unfair commercial practices on the part of a dominant undertaking intended to eliminate, discipline or deter smaller competitors would thus fall within the scope of the prohibition of Article 86 if the other conditions for its application were fulfilled.[142]

Undoubtedly, Art 86 should be applicable to exclusionary practices. However, by using those vague prefixes of "unfair", "intended", and "smaller competitors", this general rule of applicability was not entirely clear, in the sense that those prefixes did not help explain how the foreclosure harm would transpire; instead, they seem to suggest the consideration on other non-foreclosure-related sources of harm. Those sources of harm were not clarified but nonetheless could be fitted into the structure-based approach and therefore contributed greatly to the formulation of the AKZO test for assessing predatory pricing practices.

Emphasizing the "Strategic Aspect" of the Price Cutting

The Commission rejected AKZO's argument that the anticompetitive assessment on the price-cutting practice in question should revolve around a verification of whether the price offered was below the average variable cost ("AVC").[143] The rejection was based on the following two grounds:

- First, the Commission was of the opinion that AKZO's classification of what was AVC was wrong, because AKZO treated costs of labor, repair and maintenance as fixed cost.[144]
- Secondly and more importantly, the Commission found that besides the aggressive price-cutting, "there are other aspects of AKZO Chemie's commercial conduct which may also fall under the heading of exclusionary behaviour".[145] On that factual basis, it refused to limit the examination to a price-cost comparison,[146] alleging that those strategic aspects enabled AKZO to effectively exclude competitors without having to price below average variable cost.[147]

The Commission's reasons for center-staging those strategic aspects were "the broad objectives of EEC competition rules set out in Article 3(f)" and particularly the structural preservation of competition.[148] To the Commission's understanding, "the broad objectives" included, for example, the fundamental concern for the harm of "discrimination".[149] Meanwhile, the structural perspective represented a more dynamic and longer-term

142 The Commission decision on *AKZO*, para 74.
143 Ibid., para 75.
144 Ibid., para 76.
145 Ibid., para 75.
146 Ibid., para 77.
147 Ibid., para 78.
148 Ibid., para 77.
149 Ibid.

consideration on efficiency, whereby "smaller but possibly more efficient firms" would be protected from exclusion.[150] However, by referring to "smaller but possibly more efficient firms", the Commission failed to address AKZO's argument that less efficient competitors should not be protected. In other words, it sidestepped the questions whether (and if yes why) "smaller and less efficient firms" should be protected.

Resorting to the Element of Intent and the Ensued Issues

In an effort to take concrete steps to examine those strategic aspects of exclusion, the Commission introduced the element of anticompetitive intent. As it stated, "There can thus be an anticompetitive object in price cutting whether or not the aggressor sets its prices above or below its own costs",[151] and "The pursuance by a dominant firm of a strategy of eliminating competitors or potential competitors by unfair means differing from normal competition would in principle fall under Article 86 whatever the detailed mode of implementation".[152] It suggested a couple of indicators of such an anticompetitive intention: internal documentation and the case circumstances.[153] Following this analytical route, the Commission found AKZO to have abused its dominance by this price-cutting practice,[154] without engaging in any price-cost verification.

This intention-based analytical route raised a few issues. First, it is questionable whether *intent* would be an ideal proxy for assessing those "strategic aspects". Arguably, actual and potential anticompetitive outcomes (effects) would have been better proxies. Admittedly, in paragraph 83 the Commission did employ the expression of "anticompetitive effect", but a closer look would reveal that this so-called effect was largely theoretical and presumed.[155] Supposedly, talking about "effect" requires a more or less balanced assessment of pro-competitive and anticompetitive effects.

The second issue is precisely the lack of a really balanced assessment by the Commission, despite its seeming intention to do so.[156] This is exemplified particularly by the unconvincing dismissal of AKZO's as-efficient-competitor argument.[157] By rejecting a calibrated version of the AVC-price comparison proposed by AKZO, the Commission seems to have indicated that the need of preserving competition would prevail over the need of respecting a dominant

150 Ibid.

151 Ibid., para 79.

152 Ibid., para 80.

153 Ibid.

154 Ibid., paras 81–82.

155 Ibid., para 83.

156 Ibid., para 80 ("A detailed analysis of the alleged aggressor's costs may however be of considerable importance in establishing the reasonableness or otherwise of its pricing conduct as well as the underlying purpose thereof.").

157 Ibid., para 75.

undertaking's activities for advancing its own business interests, even when those activities were not intended to restrict competition.[158]

Supposedly, the illegality of those activities would have to depend on whether they result in the effect of competition restriction. Then as part of the balancing consideration, the question would come to whether those competitors were just less efficient and therefore deserved to be excluded. In that regard, the Commission did not really provide an answer, but simply *presumed* that those competitors were equally efficient, and therefore their exclusion should not happen. In that sense, it could be said that the Commission's balancing of "preserving competition" and "respecting an undertaking's legitimate business activity" was undue.

Related to this imbalance is the third issue: the lack of a clear delineation on some crucial concepts. For example, while acknowledging that a dominant undertaking "is entitled to compete on the merits",[159] the Commission did not explain how to distinguish, in light of the anticompetitive assessment, *competitive behavior by virtue* and *competitive behavior by abusing dominance*, or *performance superiority* and *performance advantages for being a dominant incumbent*. Consequently, no real implication was yielded from this seemingly righteous acknowledgment.

2.7.1.2 The ECJ Judgment and the AG Opinion

The ECJ confirmed the Commission's finding that AKZO was dominant in the EEC organic peroxides market.[160] It also validated the Commission's finding that the abuse took place in the flour additives market in the UK and Ireland.[161] In addition, it found that ECS was planning to enter the organic peroxides market,[162] and this prompted AKZO to launch the price-cutting practice against ECS in the flour additives market, which was of limited importance to AKZO but was vital to ECS, in order to prevent ECS from entering the market dominated by AKZO.[163]

A Structure-Oriented Conception of the Foreclosure Harm and the Associated Integration Concern

In the abuse analysis, the ECJ considered *competition foreclosure* as the core harm, as the Commission had done. Its conception of the foreclosure harm was also structure-oriented like the Commission's: after referring to *Hoffmann-La Roche* for the objective conception of abuse, the ECJ made the following ruling:

158 Ibid., para 78.

159 Ibid., para 81.

160 Case 62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I 3359, paras 60–61 (hereinafter, "the ECJ judgment on *AKZO*").

161 Ibid., para 35.

162 Ibid., para 40.

163 Ibid., paras 41–44.

> Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality.[164]

In other words, the ECJ suggested that there are two qualitatively different kinds of pricing practices: one that is the outcome of competition, and one that takes place in a situation where competition is missing or distorted. According to the ECJ, the former would be permissible, but the latter would constitute an abuse because it is an exploitation of the dominant market power. In that sense, what determines the legality of these two kinds of pricing practices is not their internal nature (such as the forms), but the external competitive situation, or in other words, their effects.

The ECJ did not include the AG's consideration on the freedom to compete. The AG in his opinion made another harm allegation (in addition to the foreclosure harm) when examining the direct threats made by AKZO against ECS:[165] *the restriction of the freedom to compete*, a restriction of which would trigger a *per se* abusive ruling.[166] The AG seems to have paired up the harm of foreclosure with the harm of freedom-limitation, thereby concluding with a *per se* rule of illegality.[167] However, it was not entirely clear whether the AG's reference to "freedom to compete" meant (1) the freedom of the upstream suppliers of the dominant undertaking who were asked not to supply the dominant undertaking's competitors, or (2) the freedom of the input-foreclosed competitors of the dominant undertaking. If the answer were (1), it would be unreasonable to conclude with a *per se* abusive ruling without any discussion on whether competition in the upstream market had indeed been impeded. If the answer were (2), it would also be unjustified as to why the impediment to competition was not further examined. Therefore, the linking with freedom to compete was arguably farfetched.

In any event, just like what the Commission did, the ECJ sidestepped the issue whether the particularly targeted competitors actually deserved to be excluded for having inferior performances. It only gave an ambiguous presumption that those excluded competitors

164 Ibid., para 70.

165 Opinion of Mr Advocate General Lenz (delivered on April 19, 1989) in Case 62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I 3359, para 127 (hereinafter, "the AG opnion on *AKZO*").

166 Ibid., para 147 ("If the abuse consists in the restriction of the freedom of other undertakings to compete, the threat of economic disadvantages may in itself suffice for the finding of an infringement of Article 86.").

167 "A *per se* rule of illegality" in the context of competition law means that a conduct is to be deemed illegal automatically. The presupposition is that the anticompetitiveness of that conduct is so obvious that no further examination is needed. In comparison, "a rule of reason" means that a conduct will be found illegal only if it fails the antitrust scrutiny regarding its anticompetitive effects. See Robert H. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division," *The Yale Law Journal* 75, no. 3 (1966): 384–87 (discussing the propriety of a *per se* rule). See also generally, Herbert Hovenkamp, "The Rule of Reason," *Florida Law Review* 70 (2018): 81–167 (discussing the proper balance between the adoption of the *per se* rule and the rule of reason).

"are perhaps as efficient as the dominant undertaking",[168] without prescribing any concrete solutions on how to ascertain that presumption. Arguably, a theory of the foreclosure harm should be aimed at ensuring the openness of market access, instead of objecting the exclusion of particular (and possibly less efficient) competitors. However, taking into account the mandate of market integration, this theory of harm became understandable: it served as an expedient to rectify the practices of certain undertakings and an intermediary step to foster competition in the stage of establishing a Common Market. In that sense, this structural conception of the foreclosure harm was related to the concern for market integration.

The Element of Intent and the Presumed Anticompetitive Effects

Regarding the necessity of a price-cost comparison, the ECJ agreed with the Commission that, although not a decisive factor for determining the abusiveness of a price reduction, a price-cost comparison is nonetheless an important aspect of consideration in a balanced anticompetitive assessment.[169] The underlying logic is that, when *an intention to exclude* of a dominant undertaking is not obvious, it could be useful to engage in a price-cost comparison, under the premise that below-cost pricing would definitely signify an intention to exclude. On that basis, the ECJ agreed with the Commission that the analytical focus should shift to identifying *an intention to exclude*.

In that event, questions arise as to (1) whether such an intention would necessarily guarantee anticompetitive outcomes (even if other "strategic aspects" of the price-cutting practice were taken into account), and (2) in what aspects *an intention to exclude* would qualitatively differ from *a benign intention to compete on the merits*. Regarding the first question, the ECJ's answer was that such an intention would presumptively entail anticompetitive outcomes, because a dominant undertaking would have no interest in applying prices below average variable costs "except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position".[170]

The ECJ did not provide an answer to the second question. This question was discussed more thoroughly later in *France Télécom*. In this case, the GC used "anticompetitive objective" as a proxy to verify "anticompetitive effect". It made this general ruling:

> If it is shown that the objective pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.[171]

168 The ECJ judgment on *AKZO*, para 72.

169 Ibid., para 65.

170 Ibid., para 71.

171 Case T-340/03 *France Télécom SA v Commission of the European Communities* [2007] ECR II 107, para 195 (hereinafter, "the GC judgment on *France Télécom*").

The GC in *France Télécom* then referred to *AKZO* to explain how that proxy works: In a situation where the prices in question were found below AVC, "the only interest which the undertaking may have in applying such prices is that of eliminating competitors", and therefore a predatory intention could be *presumed*.[172] This line of reasoning was also consistent with the preceding *Tetra Pak* case, in which the ECJ upheld the CFI's ruling that there would be no need to prove an intention to exclude competitors if the price in question is below AVC.[173] Also, it was held in that case that there would no need to examine the possibility of recoupment.[174]

Meanwhile, in a situation where the prices were above AVC but below average total costs ("ATC"), the Commission would be required to prove an anticompetitive objective ("a strategy of 'pre-emption'").[175] As regards to this kind of situation, the GC assessed contextually France Télécom's internal documents, and found them to be a clear indicator of an anticompetitive objective.[176] It also considered the anticompetitive objective to have been proved by France Télécom's awareness of the fact that its pricing strategy would not be economically sustainable for its competitors.[177] The ECJ upheld the GC's contextual assessment in appeal.[178]

The AKZO Formula

Based on this presumption of anticompetitive effects, the ECJ constructed the first part of the AKZO formula for assessing predatory pricing: pricing below AVC by a dominant undertaking is *per se* abusive, because it is an unequivocal indication of an intention to exclude.

The second part of the AKZO formula was based on the "intention-centered" analytical rationale: pricing below ATC but above AVC by dominant undertaking will be abusive if the pricing practice is "part of a plan for eliminating a competitor".[179] According to paragraphs 143–146 of the judgment, there seems to be an implicit presumption in this second part of the AKZO test: if there is no finding that a "below ATC but above AVC" price is a response to competition, that price will be be presumed as serving an exclusionary aim.[180]

172 Ibid., paras 195, 197.

173 Case C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I 5951, paras 41–42.

174 Ibid., para 44.

175 The GC judgment on *France Télécom*, para 198.

176 Ibid., paras 202, 206–09.

177 Ibid., paras 210–14.

178 Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I 2369, paras 97–99 (hereinafter, "the ECJ judgment on *France Télécom*").

179 The ECJ judgment on *AKZO*, para 72.

180 Ibid., paras 143–46.

2.7.2 Post Danmark I

This preliminary ruling case concerned selective low pricing. Post Danmark was found dominant in the market for the distribution of unaddressed mails in Denmark, and its main competitor in that market was Forbruger-Kontakt.[181] At the end of 2003, Post Danmark offered services with selectively low prices to SuperBest, Spar, and Coop, all three of which were former customers of Forbruger-Kontakt.[182] Those prices were found below Post Danmark's ATC, but above its "average incremental costs" ("AIC").[183]

The Danish competition council, the appeal tribunal, and the eastern regional court all found the pricing conduct in question to be an abuse of dominance, on the ground that its selectivity resulted in "secondary-line price discrimination" to the prejudice of its pre-existing customers and could not be justified by cost-related reasons.[184] Post Danmark appealed to the Danish court making this preliminary reference, which asked the ECJ two questions:

(1) Whether a price offered by a dominant undertaking could be found abusive if it is below ATC but above AIC and without an exclusionary purpose?

(2) If the answer to the first question is affirmative, what circumstances should be taken into account for finding abuse?[185]

2.7.2.1 The ECJ Ruling

The Harm of Competition Restriction and the "All Circumstances" Assessment Approach

The ECJ started answering the questions by clarifying the underlying harm. Referring to *TeliaSonera*, it accentuated the harm of *competition restriction*, and backed up that harm allegation with a concern for *consumer welfare*.[186] The ECJ's conception of that harm seems to have included both "primary-line injury", namely the exclusion of competitors of the dominant undertaking, and "secondary-line injury" within the meaning of Art 82(c) of the EC Treaty.[187]

Subsequently, it clarified the concept of "competition on the merits". Based on *Michelin I*, *Compagnie maritime belge transports*, and *TeliaSonera*, the ECJ distilled the point that domination (or monopolization) "on its own merits" is not condemnable, because it could

181 Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, paras 3–5 (hereinafter "the ECJ ruling on *Post Danmark I*").

182 Ibid., para 6.

183 Supposedly, AIC incorporates "AVC of the particular business in question" and "common variable costs" of that business shared with other adjacent businesses. See ibid., paras 9, 33.

184 Ibid., paras 14–16.

185 Ibid., para 18.

186 Ibid., para 20.

187 Ibid., para 26. However, it was observed that the concern for "secondary-line injury" within the meaning of Art 102(c) is becoming increasingly obsolete among the views of the Commission and competition lawyers, caused by the economic awareness that price discrimination of a dominant undertaking has no causal link with upstream or downstream competition distortion. On this point, see Zenger, "Loyalty Rebates and the Competitive Process," 741.

just be the natural process and manifestation of "competition on the merits", which is to be encouraged under Art 82 of the EC Treaty.[188] In line with that logic, it ruled that Art 82 protects competition but does not protect less efficient competitors, since their being excluded is the expected result of "competition on the merits".[189]

Based on that ruling and the *AKZO* case, the ECJ construed a scenario where a pricing practice would be prohibited under Art 82. That scenario contains two parameters of consideration: the *methods* and the *effects* of a pricing practice. The first one requires that, to trigger the prohibition of Art 82, the methods employed should be non-merits-based. The second one requires that there should be exclusionary effects on as-efficient competitors.[190] To ascertain these two requirements, the ECJ laid out the "all circumstances" assessment approach, which had been repeatedly upheld in the case law.[191] To carry out such an assessment, useful pointers include those from the AKZO formula for finding predatory pricing: ATC, AVC, and the exclusionary purpose.[192]

The Post-Danmark Formula

When examining the pricing conduct in question, the ECJ noted that a finding of "exclusionary purpose" was missing in this case,[193] and that the cost benchmarks employed in this case were also different from those of *AKZO*: the Danish authority used AIC instead of AVC.[194] According to the Danish competition council, AIC incorporates "AVC of the particular business in question" and "common variable costs" of that business shared with other adjacent businesses.[195] "Average fixed costs" are included in ATC but not in AIC.

Relying on the particular cost benchmarks used in this case, the ECJ resorted to the "as efficient competitor" rationale to continue the "all circumstances" assessment approach.[196] In that sense, a "Post Danmark formula" was established: when a price is below ATC but above the AIC pertaining to the particular business activity in question, it will be found abusive only if it can drive out equally efficient competitors. As an alternative to the AKZO formula, the Post Danmark formula does not rely on a finding of exclusionary purposes. Instead, it focuses on finding effects in all the relevant circumstances, making the examination scope extending far beyond a price-cost comparison of the suspected undertaking itself.[197]

188 The ECJ ruling on *Post Danmark I*, para 21.

189 Ibid., para 22.

190 Ibid., paras 24–25.

191 Ibid., para 26.

192 Ibid., paras 27–28.

193 Ibid., paras 29–30.

194 Ibid., paras 31–35.

195 Ibid., para 33.

196 Ibid., para 38.

197 Ibid., para 39. See also, Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases*, 4th ed. (Oxford: Hart, 2014), 213 (describing and comparing the Post Danmark formula with the AKZO formula).

2.8 Misuse of the Patent Process

2.8.1 AstraZeneca

This was a case about the misuse of the patent process for abuse purposes. Although not linked with other cases in terms of the abusive practices in question, this case is relevant for understanding the concept of "competition on the merits".

The Commission found two abuses of dominance committed by AstraZeneca: (1) making misleading representations to national patent offices so as to obtain Supplementary Protection Certificates ("SPCs") that, without the misleading representations, it would have obtained for a shorter period of validity or would not have obtained at all;[198] (2) a strategy including the selective deregistration of market authorizations and the switch from capsules to tablet of the medical product in question.[199] The relevant markets were the prescription PPIs from 1993 to 2000 in Belgium, Germany, the Netherlands, Norway, Sweden, the UK, and from 1993 to 1999 in Denmark.[200] After considering a list of general and country-specific criteria, the Commission found AstraZeneca dominant in these seven markets in different periods.[201]

2.8.1.1 The Commission Decision

The First Abuse

The alleged harm was *the restriction of competition*. The Commission's concern was that, since SPCs as exclusive rights already had the inevitable effect of competition restriction,[202] obtaining such rights by ways of deception would exceed the tolerable level of competition restriction and therefore should be prohibited under Art 82 of the EC Treaty.[203]

First, the Commission examined the deceptiveness of the first conduct in question. It identified two stages of this alleged abuse, and showed that AstraZeneca had been continuously and deliberately making misleading representations and consequently had successfully implemented an overall exclusionary strategy.[204] It held that the SPCs would not have been granted in the absence of the "abusive misleading representations", and therefore AstraZeneca's acquisition of such SPCs was outside the protected scope of intellectual property rights ("IPRs").[205]

198 Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A. 37.507/F3 – AstraZeneca), para 144, http://ec.europa.eu/competition/antitrust/cases/dec_docs/37507/37507_193_6.pdf (accessed November 12, 2018) (hereinafter, "the Commission decision on *AstraZeneca*").

199 Ibid., paras 255, 788.

200 Ibid., para 504.

201 Ibid., para 601.

202 Ibid., para 767.

203 Ibid., para 626.

204 Ibid., paras 628–31, 681.

205 Ibid., paras 741–42.

Secondly, the Commission discussed how this deceptive conduct generated anticompetitive effects. In that regard, it referred to *Irish Sugar* and *Michelin II* for the "potential effect" threshold of proof that it was obligated to fulfill.[206] Accordingly, it directed the analysis of "anticompetitive effects" towards the demonstration of an "anticompetitive object", which the Commission had shown when examining the conduct. On that basis, it laid out three aspects of consideration: (1) the fact that AstraZeneca's supply of misleading representations led to the granting of SPC protection in three countries, which resulted in exclusion, or at least uncertainty, upon the competitors;[207] (2) the fact that AstraZeneca's strategy entailed longer SPC protection in four countries, thereby furthering the exclusionary effect;[208] (3) the *risk* of competition restriction in the two countries where the strategy was implemented, albeit unsuccessfully.[209]

The Second Abuse

The harm of the second conduct was also *the restriction of competition*. The Commission construed it from two aspects: the prevention or delay of generic products from emerging, and the limitation on parallel-traded products.[210] On that basis, it examined the conduct in question in three folds: (1) whether those two aspects of harm were the main purposes of AstraZeneca; (2) whether the conduct in question was planned and implemented to achieve those purposes; (3) whether those two purposes were underpinned by the longer-term goal of restricting competition in a "post-patent" scenario.[211]

After demonstrating the exclusionary purposes of the conduct in question, the Commission moved on to analyzing the anticompetitive effects. In that regard, it adopted the "potential effect" threshold of proof, and considered AstraZeneca's *confidence* in implementing that conduct was enough proof of the potential anticompetitive effect.[212]

2.8.1.2 The Judgments of the GC and the ECJ

The GC upheld the Commission decision for the most part. It only annulled two findings by the Commission: the finding that the first abuse began when AstraZeneca sent instructions to patent attorneys,[213] and the finding that the second abuse was capable of restricting parallel imports in Denmark and Norway.[214] In any event, the GC did not question the

206 Ibid., para 758.
207 Ibid., para 760.
208 Ibid., paras 761–62.
209 Ibid., paras 763–65.
210 Ibid., para 789.
211 Ibid.
212 Ibid., para 848.
213 Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II 2805, para 370 (hereinafter, "the GC judgment on *AstraZeneca*").
214 Ibid., paras 808, 845–62, 865.

Commission's theories of harm on the two abuses. The GC judgment was wholly upheld in the further appeal to the ECJ.[215]

The judgments of the GC and the ECJ refined the Commission's theories of harm. The refinement revolved around one issue: distinguishing what is and what is not "competition on the merits".

Competition on the Merits

The GC was of the opinion that Art 82 of the EC Treaty prohibits a dominant undertaking from employing "non-merits-based" methods to compete.[216] The GC presented the concept of "competition on the merits" by referring to paragraph 70 of *AKZO*, which addressed "competition on the basis of quality". This line of reasoning was approved by the ECJ.[217] Moreover, the GC invoked the "special responsibility of a dominant undertaking" rationale, and construed the "competition on the merits" concept as a derivative of that rationale.[218] This was also accepted by the ECJ.[219] When it came to assessing whether a practice falls outside the "competition on the merits" scope, the GC held that "intent" could be a relevant criterion, but not a necessary condition for finding abuse pursuant to the objective conception of abuse.[220]

Nonetheless, the ECJ clarified that, when assessing whether dishonest conduct such as the first one of this case was outside the scope of "competition on the merits", a contextualized approach should be taken, instead of declaring all fallible practices in regulatory proceedings condemnable under Art 82.[221] In that sense, the ECJ seems to have suggested a consideration on the principle of proportionality, for balancing "preserving competition" and "respecting an undertaking's right to defend its legitimate business interests". This principle was also shown in its examination of the second conduct. There, in an effort to delineate merits-based competitive behavior and non-merits-based behavior, the ECJ indicated the need of such a balance.[222]

The First Abuse

The GC described the first conduct in question as a consistent and linear strategy of supply misleading representations so as to obtain SPCs to which AstraZeneca would have been

215 Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission*, ECLI:EU:C:2012:770, para 206 (hereinafter, "the ECJ judgment on *AstraZeneca*").

216 The GC judgment on *AstraZeneca*, para 354.

217 The ECJ judgment on *AstraZeneca*, para 75.

218 The GC judgment on *AstraZeneca*, para 671.

219 The ECJ judgment on *AstraZeneca*, paras 98, 134, 149.

220 The GC judgment on *AstraZeneca*, para 359.

221 The ECJ judgment on *AstraZeneca*, para 99.

222 Ibid., para 129.

entitled for a shorter period or would not have beeen entitled at all.[223] Upon examination, it held that such conduct was outside the scope of "competition on the merits", because it served the sole aim of restricting competition by means of misusing the patent process.[224] The ECJ reexamined this issue and found no mistake made by the GC.[225] In the reexamination, the ECJ consistently emphasized the deliberateness of AstraZeneca's supply of misleading information to the patent offices[226] and its tactical concealment of the correct information as evidenced by various findings of fact.[227]

The Second Abuse

The second conduct in question was examined in the same approach. By highlighting the exclusionary purpose of the deregistration, which was deemed to be unjustifiable from every angle, the ECJ agreed with the GC that the second conduct did not fall within the scope of "competition on the merits" either.[228] In that light, the fact that AstraZeneca had the right to deregister did not preclude the possibility of infringing Art 82.

2.9 Refusal to Supply

2.9.1 Commercial Solvents

In this case, Zoja was a competitor of ICI (which was a subsidiary of CSC) in terms of the production of ethambutol. At the same time, Zoja was a customer of ICI for the supply of aminobutanol, a raw material for producing ethambutol.[229] Viewing CSC and ICI as a single undertaking, the Commission found this undertaking to be dominant in the market of raw material supply for ethambutol production.[230] The abuse was this dominant undertaking's refusal to supply aminobutanol to Zoja.

2.9.1.1 The Commission's Theory of Harm

The Undermining of Market Structure and the Limitation of Production

The Commission alleged two aspects of harm:

- Negatively affecting the market structure, and
- Limiting the production of raw material for ethambutol.

223 The GC judgment on *AstraZeneca*, para 598.

224 Ibid., para 608.

225 The ECJ judgment on *AstraZeneca*, paras 76, 93.

226 Ibid., paras 77–79, 81–84.

227 Ibid., paras 85–92.

228 Ibid., paras 130–32.

229 72/457/CEE: Décision de la Commission, du 14 décembre 1972, relative à une procédure d'application de l'article 86 du traité instituant la Communauté économique européenne (IV/26.911 - ZOJA/CSC - ICI), [December 31, 1972] OJ L 299, 51, 53 (hereinafter, "the Commission decision on *Commercial Solvents*").

230 Ibid., 54.

The Commission's theory of harm was brief. Regarding the first aspect of harm, it stated that the conduct in question could lead to the elimination of a major ethambutol producer and therefore would seriously undermine the maintenance of effective conditions of competition in the Common Market.[231]

Regarding the second aspect, the Commission stated that the conduct in question limited the distribution of raw material and consequently the production of ethambutol, therefore constituting an abuse expressively prohibited by Art 86 of the EEC Treaty.[232] Although the Commission did not specify which kind of abuse, it is safe to assume it meant the kind enumerated in Art 86(b).

2.9.1.2 The ECJ Judgment and the AG Opinion

An Unequivocal Focus on Market Structure

The ECJ's theory of harm revolved closely around the concern for *market structure*. Relying on Art 3(f) of the EEC Treaty, it reasoned that the refusal to supply a customer by a dominant undertaking would infringe Art 86 if it risked eliminating "all competition on the part of this customer".[233] According to the ECJ, to amount to that risk, it would suffice if the refusal were based on "the object of reserving such raw material for manufacturing its own derivatives".[234]

Also, the ECJ seems to suggest that, if the abovementioned conditions were met, it would no longer be necessary to engage in a circumstantial examination as to whether the refused customer was able to find alternative supplies, on the ground that "that question is not relevant to the consideration of the conduct of the applicants".[235]

Market structure was also crucial in the examination of *the effects on trade between Member States*. First, the ECJ stated that this "effects on trade" requirement "is intended to define the sphere of application of Community rules in relation to national laws"[236] and should not be used to find different treatment between "production intended for sale within the market and that intended for export".[237] On that basis, it stated that this requirement was aimed at preserving "the effective competitive structure as envisaged by Article 3(f) of the Treaty".[238] Therefore, the ECJ made this "effects on trade between Member States" requirement more than just a jurisdictional threshold: it linked this requirement back

231 Ibid.

232 Ibid., 55.

233 Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 223, para 25 (hereinafter, "the ECJ judgment on *Commercial Solvents*").

234 Ibid.

235 Ibid., para 26.

236 Ibid., para 31.

237 Ibid., para 33.

238 Ibid., para 32.

to—and thereby reinforcing—the "market structure" consideration, which suggests that conduct by a dominant undertaking should be prohibited if it eliminates a competitor and therefore impairs the market structure.[239]

Dismissing Discrimination as a Source of Harm

The ECJ did not adopt the AG's approach, which shifted the focus to discrimination. Taking CSC's perspective, the AG suggested that refusing to supply Zoja could be justifiable if it involved exclusive ownership and was for the purpose of product integration, but would be unjustifiable if it was targeted at (and therefore discriminating) Zoja.[240]

In that light, the AG presented a different version of theory of harm. On the one hand, he agreed with the Commission's first allegation of harm, by stating that by implication of Art 3(f) of the EEC Treaty, competition should not be eliminated.[241] On the other hand, he disapproved of the second harm allegation by the Commission, namely the reference to paragraph (b) of Art 86. He stated that refusal to supply "is not mentioned expressly in that Article".[242] Instead, the AG resorted to paragraph (c), which prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".[243] In that regard, he found no convincing defense provided by CSC for discriminating Zoja.[244] In any event, the ECJ disregarded this line of reasoning. It seems that the ECJ decided to be cautious about invoking paragraph (c).

2.9.2 United Brands

2.9.2.1 The Commission's Theory of Harm

Competition Foreclosure as the Core Harm and a Limited Analysis

Refusal to supply was one of the four abuses in this case. The core harm alleged by the Commission was *output-foreclosure of competition*. As it stated, the refusal to supply the distributor "would discourage it and other distributors/ripeners from selling competing brands", and thereby would prevent UBC's competitors from having access to principal distributors.[245] The Commission provided a rather theoretical account on how the refusal would cause the alleged harm, as it performed no verification regarding the causal link between the output foreclosure and the demise of UBC's competitors.

239 Ibid., para 33.

240 Opinion of Mr Advocate General Warner (delivered on January 22, 1974) in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 223, 268–69 (hereinafter, "the AG opinion on *Commercial Solvents*").

241 Ibid., 270.

242 Ibid.

243 Ibid.

244 Ibid., 269.

245 The Commission decision on *United Brands* (note 96 above), 16.

Seemingly, the Commission had in mind a secondary allegation of harm: the restriction of *freedom of choice* of the customers. As it stated,

> A buyer must be allowed the freedom to decide what are his business interests, to choose the products he will sell, even if they are in competition with each other; in effect to determine his own sales policy.[246]

2.9.2.2 The ECJ Judgment and the AG Opinion

The Central Concern for Market Integration

The ECJ pointed out two sets of harm of this abuse:

- *Limiting markets to the prejudice of consumers* as laid down in paragraph (b) of Art 86 of the EEC Treaty, and
- *Discrimination of customers* as laid down in paragraph (c) of Art 86.[247]

The ECJ did not provide much explanation on how these sets of harm would come about, but nonetheless took a strict stance against the kind of refusal to supply in question. As it stated, a dominant undertaking "cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary".[248] Therefore, it presumed abusive a dominant undertaking's refusal to supply normal demands, instead of giving it the benefit of doubt.

In an effort to justify this presumption, the ECJ resorted to subjective factors of consideration. It suggested that such behavior "cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it".[249] Consequently, one question emerged regarding how to discern *purposes of protecting legitimate commercial interests* and *purposes of strengthening dominance*. On that point, the ECJ's examination of the case circumstances indicated that there is no qualitative difference but only a quantitative one between abuse of dominance and self-defense of commercial interests.[250]

Besides the abovementioned two sets of harm, the ECJ also considered *restriction of freedom* as a supplementary source of harm. This can be seen from the ECJ's ruling that this refusal "amounts therefore to a serious interference with the independence of small and medium sized firms".[251] Once again, verifications on this harm allegation were missing. By stating that this conduct "is designed to have a serious adverse effect on competition", the ECJ deflected the question of what kind of adverse effect on competition it was referring to. In that event, the following questions emerge:

246 Ibid., 16–17.

247 The ECJ judgment on *United Brands* (note 101 above), para 183.

248 Ibid, para 182.

249 Ibid., para 189.

250 Ibid., paras 190–92.

251 Ibid., para 193.

- Is this adverse effect the restriction of competition at the UBC level? If so, how the competitors of UBC were restricted?
- Or is it the restriction of competition between the refused distributor (Olesen) and its competitors? If so, how the refusal to supply was linked with the market competition where Olesen was in?

These questions were not answered in the judgment, but they help identify where the ECJ's concerns were. Read in conjunction with the finding of dominance in the judgment, this finding of abuse seems to suggest that the ECJ did not pay much attention to the competition (if there were any) between UBC and its competitors. There was also no mentioning of any kind of competition among the distributors. This was in contrast with the AG opinion, which identified the central harm to be the disruption of competition at the downstream level. According to the AG, the refusal in question was an extreme effort of UBC to ration its distributors, which led to a "temporary but serious deterioration in the position" of the refused distributor,[252] and would constitute an abuse under Art 86 "if a ripener/distributor may very well disappear from the market and the pattern of the supply of bananas may be appreciably modified in a substantial part of the Common Market".[253] Moreover, the ECJ's lack of competitive analysis could not be explained by the taking of an exploitative-abuse assessment approach, because refusal to supply as a way to extract monopoly profits does not make sense in the circumstances given in this case.[254] Therefore, the only possible account is the mandate of market integration.

2.9.3 BP

2.9.3.1 The Commission's Theory of Harm

A Questionable Allegation of Harm and an Equally Questionable Theory

In this case, BP, a petroleum supplier, cut back supply to its customer, ABG, after the outbreak of the oil crisis at the end of 1973.

The Commission alleged the harm of *secondary-line distortion of competition* within the meaning of Art 86(c) of the EEC Treaty.[255] When constructing the theory of that harm, the Commission did not examine the competitive situation of the market where ABG was in; instead, it relied heavily on the presupposition that a dominant undertaking like BP had the obligation to treat every customer non-discriminatorily. As the Commission stated, to avoid being caught by Art 86, "a dominant undertaking must allocate any available quantities

252 The AG opinion on *United Brands* (note 98 above), 334.

253 Ibid., 334–35.

254 Refusal to supply could be used to preserve monopoly profits in situtions where, for example, overly competitive distributors were undermining the monopoly producer's profit extraction. Nonetheless, that was not the case here.

255 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands), [May 9, 1977] OJ L 117, 9 (hereinafter, "the Commission decision on *BP*").

to its several buyers on an equitable basis".[256] On that basis, it found that BP's reduction of supply to ABG was out of proportion compared with the reduction of supply to other contractual and non-contractual customers.[257]

This harm allegation is questionable, in the sense that the conduct in question did not fit well in the description of Art 86(c). Presumably, a reduction of supply should count as a refusal to supply certain proportions of demand, instead of the (exploitative) application of dissimilar trading conditions, because there would be no application of dissimilar conditions to begin with if there were no deal. Moreover, the Commission claimed (without substantiation) that ABG was "a competitor of BP in the motor spirit distribution market", therefore suggesting that there was also a risk of input-foreclosure of competition in that market.[258] This made the harm allegation even more obscure.

The premise of the Commission's theory of harm is also questionable. It emphasized the competitive value of maintaining the normal "extent, regularity and continuity of commercial relationships".[259] This premise was clearly construed under a structural view of competition; more specifically, it contained a preconceived notion of what a competitive structure should look like. However, it is questionable whether the maintenance of certain "extent, regularity and continuity of commercial relationships" would necessarily optimize competition: First, this preconceived version of a competitive structure, and the presumption that a dominant undertaking reducing supplies to its customer would undermine competition (instead of giving it the benefit of doubt), were unverified. Admittedly, this preconception and this presumption would not need verification if this were a *per se* abuse case; but here, it is doubtable whether the conduct in question ("discrimination of customer" as alleged by the Commission) should be subject to a *per se* abusive rule. Secondly, the dictation, or second-guessing, of how the dominant undertaking should have conducted its business, was arguably too arbitrary and intrusive.

2.9.3.2 The ECJ Judgment and the AG Opinion

The ECJ annulled the Commission decision. This was also the AG's opinion. Two points are notable. First, the AG questioned the Commission's finding of dominance. The logic was that temporarily gained market power owning to some sudden changes of circumstances should not qualify as market power within the definition of dominance, because an undertaking in such a temporary situation must consider the prospect of retaining customers once the emergency was over.[260]

256 Ibid.

257 Ibid., 10.

258 Ibid., 11.

259 Ibid., 10.

260 Opinion of Mr Advocate General Warner (delivered on May 23, 1978) in Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities* [1978] ECR 1513, 1537–38 (hereinafter, "the AG opinion on *BP*").

Secondly, the ECJ and the AG held that no private undertakings should be expected to assume the governmental responsibility of allocating resources of production in times of emergency.[261] In other words, an undertaking should not be expected to act in all fairness and equitability if that would hamper its freedom to pursue its legitimate business interests.[262] Based on this separation of public function and private freedom, and the observation that ABG did not really suffer any damage on fault of BP,[263] the ECJ found no evidence of abuse.

2.9.4 CBEM-Telemarketing

2.9.4.1 The ECJ Ruling

This preliminary ruling case concerned CBEM, a Belgian telemarketing company, being refused from purchasing television time on RTL, a television station operated by CLT and IPB, to carry out telemarketing operations that used CBEM's own telephone number. CBEM applied for an injunction before a Belgian national court, claiming that RTL's refusal constituted an abuse of dominance under Art 86 of the EEC Treaty. For that matter, the Belgian court summited two questions to the ECJ concerning the application of Art 86: (1) whether a dominant position can be found in a situation where an undertaking is granted with legal monopoly, and (2) whether it constitutes an abuse of dominance if a dominant undertaking reserves for itself or for a subsidiary—to the exclusion of any other undertaking—an ancillary activity that could be carried out by a third undertaking.

The ECJ answered both questions affirmatively. Regarding the first question, it referred to precedents including *Michelin I*, *General Motors*, and *Sacchi*, to reiterate the point that a dominant position or a monopoly being "brought about or encouraged by provisions laid down by law" does not preclude the application of Art 86.[264]

A Presumptive Conception of the Foreclosure Harm

The ECJ's answer to the second question relied heavily on references to *Commercial Solvents*. Based on the national court's finding that the dominant position was in the *television advertising market* while the abuse outcome was in the neighboring *telemarketing market*,[265] the ECJ qualified the conduct in question as a refusal to supply. Subsequently, it applied to this case the theory of harm in *Commercial Solvents*.[266] That theory of harm consists of

261 Ibid., 1537.

262 Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities* [1978] ECR 1513, para 34 (hereinafter, "the ECJ judgment on *BP*").

263 Ibid., paras 38–42.

264 Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261, para 16 (hereinafter, "the ECJ ruling on *CBEM-Telemarketing*").

265 Ibid., paras 7, 26.

266 Ibid., para 25.

a structural conception of the foreclosure harm[267] and a low threshold for verifying that harm.[268] As the ECJ stated,

> [A]n abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.[269]

In other words, consistent with *Commercial Solvents*, the ECJ in this case held that the harm of a refusal to supply by a dominant undertaking lies in the fact that it forecloses competition in the neighboring market. The total exclusion of a particular undertaking in the market would suffice to prove that harm, and there would be no need to carry out an examination regarding the exclusion of other undertakings or the remaining level of competition in that market. In that light, this theory of harm was built on a very presumptive conception of the foreclosure harm. Possibly, the ECJ had other concerns (such as market integration) backing up this presumptive stance, but there was no mentioning of such concerns in the judgment.

One explanation for this presumptive stance is that the ECJ's institutional role: its role as the judicial supervisor determined that it would be less interested in building an economically elaborate theory of harm, as long as the law it supervises permitted it to reach a straightforward conclusion. In this case, the *Commercial Solvent* precedent permitted the ECJ to do that. Of course, the entailed risk was making false positive errors, but this issue was outside the scope of legal reasoning. Plus, until the CJEU became aware of such errors being made, there would be no real motivation for it to change its disinterested attitude. Furthermore, even when the CJEU decided to reduce such false positive errors by embracing more economics, it could still be held back by the consideration of case justiciability and judicial costs.

2.9.5 BPB Magill

This case concerned the refusal by three broadcasting organizations in Ireland and Northern Ireland (ITP, BBC, and RTE) to grant copyright license to a TV-guide magazine publisher (Magill). Magill intended to use that license to publish TV scheduling information on a weekly basis. The Commission defined two sets of relevant markets: (1) the markets for the respective production and first publication of the advance weekly listings of each

267 The ECJ judgment on *Commercial Solvents* (note 233 above), para 25.

268 Ibid.

269 The ECJ ruling on *CBEM-Telemarketing*, para 27.

of the broadcasting organizations, and (2) the derivative product market for a weekly comprehensive TV guide, which combined all of those listings.[270] On that basis, it found the three broadcasting companies to be *de facto* monopolies on their respective production of weekly listings, because "it is not possible for third parties to produce reliable listings themselves".[271] It thus established the dominant positions of the three companies.

2.9.5.1 The Theory of Harm in the Commission Decision

Product Limitation under Art 86(b) and Competition Foreclosure in the Derivative Market

The first harm allegation was the *limitation of production* within the meaning of Art 86(b) of the EEC Treaty. It was not so much a theory as it was a literal interpretation of that Treaty provision. The Commission found the refusals to grant license, in conjunction with the threat to sue any unlicensed publication, to have prevented the emergence of a new product, namely a comprehensive TV guide, for which there was "a substantial potential demand", as demonstrated by Magill's experience and the situations in other Member States.[272]

In line with that logic, it also alleged the harm of *competition foreclosure*: by virtue, the refusals in question reserved the derivative market of weekly TV guides for the broadcasting companies themselves, therefore eliminating in that market the potential competition from a more comprehensive TV guide.[273]

Regarding the intersection of IPRs protection and Community competition rules, the Commission claimed that the refusals in question qualified as disproportionately restrictive ways of exercising the relevant copyrights.[274] Therefore, those refusals fell outside "the scope of the specific subject-matter of the intellectual property right", and should not be shielded from the application of Art 86.[275]

2.9.5.2 The CFI Judgment

Prioritizing Competition Protection over IPRs Protection

The CFI agreed with the Commission's definition of the relevant markets and the findings of dominance.[276] Its abuse examination focused on sorting out the intersection of IPRs and competition protection. First, it referred to a series of precedents to clarify that the

270 89/205/EEC: Commission Decision of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 - Magill TV Guide/ITP, BBC and RTE), [March 21, 1989] OJ L 78, para 20 (hereinafter, "the Commission decision on *BPB Magill*").

271 Ibid., para 22.

272 Ibid., para 23.

273 Ibid.

274 Ibid.

275 Ibid.

276 Case T-69/89 *Radio Telefis Eireann v Commission of the European Communities* [1991] ECR II 485, paras 61–63 (hereinafter, "the CFI judgment on *BPB Magill*").

protection of IPRs should prevail over the application of Art 86 (and other Community rules on competition and the free movement of goods) only if an IPR's restrictive effects on competition or free movements "are inherent in the protection of the actual substance of the intellectual property right".[277] Under that premise, the CFI held that the exercise of an IPR would fall outside the protected scope if "that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86".[278] This is because, in that case, "the copyright is no longer exercised in a manner which corresponds to its essential function", which is "to protect the moral rights in the work and ensure a reward for the creative effort".[279]

Subsequently, the CFI held that the conduct in question went beyond what was necessary to fulfill the *essential function* of the copyright, and therefore appeared to be arbitrary and unjustified.[280] It also stated that the conduct in question was not related to the *actual substance* of its copyright.[281] Eventually, the CFI supported the Commission's conclusion of abuse, but it also left a few issues unaddressed, such as the difference and connection between the concepts of "actual substance" and "essential function".

2.9.5.3 The ECJ Judgment and the Disregarded AG Opinion

The Circumstances-Based Finding of Abuse in a Refusal to Grant IPR

The ECJ deferred to the Commission's harm allegations, namely (1) the *limitation of production* within the meaning of Art 86(b), and (2) the *foreclosure of competition* in the derivative market.

The ECJ sidestepped the issue of balancing IPRs and competition protection. Its theory of harm was simple: while acknowledging that generally owning an IPR does not immediately induce the finding of dominance,[282] and that a refusal to grant license (even if by a dominant undertaking) does not in itself constitute an abuse,[283] it held that the *specific circumstances* of each case could entail the findings of dominance and abuse.[284]

277 Ibid., para 69.

278 Ibid., para 71.

279 Ibid.

280 Ibid.

281 Ibid., para 74.

282 Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I 743, para 46 (hereinafter, "the ECJ judgment on *BPB Magill*").

283 Ibid., para 49.

284 Ibid., paras 47, 50.

The ECJ's conception of such abuse-indicative circumstances included the following elements:

(1) The *lack of actual or potential substitute* for a weekly TV guide, for which "there was a specific, constant and regular potential demand on the part of consumers",[285]
(2) The *lack of justification* for such refusal,[286] and
(3) The refusal's actual *result of excluding all competition* in the derivative market, by way of denying access to the raw material indispensable to operate in that market.[287]

The Disregarded AG Opinion

A substantial part of the AG opinion was about the delimitation between IPRs protection and the application of Community competition rules. In that regard, the AG discussed the key concepts raised in the Commission decision and the CFI judgment, such as the "specific subject-matter" of an IPR,[288] "actual substance",[289] and "essential function".[290] The AG also examined the special circumstances viewed by the CFI as enabling the finding of abuse in the refusal,[291] and reached the conclusion that those alleged special circumstances could not justify the interference with the copyright at issue.[292] In that sense, the AG opinion was more concerned with balancing the two sets of legal interest, rather than challenging the theory of harm of the Commission and the CFI. The ECJ sidestepped that issue, by disregarding and ruling against the AG opinion.

2.9.6 Bronner

This was a preliminary ruling case. It concerned the issue of whether a dominant undertaking's refusal to provide a competitor access to its national distribution system constituted an abuse.

2.9.6.1 The Advocate General Opinion

Balancing Competition Protection and Freedom of Contract

The AG opinion focused on balancing freedom of contract and the protection of competition behind the refusal in question. He pointed out the facts that the refusing undertaking (Mediaprint) and the refused undertaking (Bronner) were competitors in the

285 Ibid., para 52.
286 Ibid., para 55.
287 Ibid., para 56.
288 Opinion of Mr Advocate General Gulmann (delivered on June 1, 1994) in Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I 743, paras 28–29 (hereinafter, "the AG opinion on *BPB Magill*").
289 Ibid., para 32.
290 Ibid., para 36.
291 Ibid., paras 63, 88.
292 Ibid., paras 97, 110.

daily newspaper market, and that Mediaprint owned the one and only home delivery system for the distribution of newspaper at the national level.

The AG discussed the application of the essential facility doctrine as invoked by Bronner[293]. First, he revisited the relevant precedents, including *Commercial Solvents*, *United Brands*, *CBEM-Télémarketing*, *GB-Inno*, *Magill*, *Volvo v Veng*, and *Tiercé Ladbroke*.[294] His summary was as follows:

> It is clear from the above rulings that a dominant undertaking commits an abuse where, without justification, it cuts off supplies of goods or services to an existing customer or eliminates competition on a related market by tying separate goods and services. However, it also seems that an abuse may consist in mere refusal to license where that prevents a new product from coming on a neighboring market in competition with the dominant undertaking's own product on that market.[295]

In addition, he briefly described the essential facility doctrine in the US context and listed the five conditions of its application.[296] He also noted some of the Commission's decisions on refusal to supply, and observed that "the Commission considers that refusal of access to an essential facility to a competitor can of itself be an abuse even in the absence of other factors".[297] The relevant laws of Member States were also briefly introduced.[298]

When assessing the refusal in question, first the AG pointed out some general reasons for the need of a balance between competition preservation and honoring freedom of contract. These reasons included the long-term pro-competitiveness of respecting an undertaking's right to choose its trading partners and the fact that Art 86 was supposed to protect competition instead of particular competitors.[299] He also pointed out that the balancing should take into account, for example, the research and development investment underpinning the product in question.[300]

293 Opinion of Mr Advocate General Jacobs (delivered on May 28, 1998) in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I 7791, paras 33–34 (hereinafter, "the AG opinion on *Bronner*").

294 Ibid., paras 35–42.

295 Ibid., para 43.

296 Ibid., paras 46–47.

297 Ibid., para 50.

298 Ibid., para 53.

299 Ibid., paras 56–58.

300 Ibid., para 62.

On that basis, the AG's answer to the preliminary question stayed closely in line with the case law, advocating that "exceptional circumstances" should be required for competition protection to outweigh freedom of contract, as established in *Magill*.[301] In other words, intervention on an undertaking's freedom of contract could be justified only if that undertaking "has a genuine strangle-hold on the related market",[302] and that the denial to access made it extremely difficult for any other undertaking to compete.[303]

2.9.6.2 The ECJ Ruling

The "Exceptional Circumstances" Element

The ECJ's answer was completely consistent with the AG opinion. Referring to *Commercial Solvents* and *CBEM-Telemarketing*, it emphasized the element of "eliminating all competition on the part of the refused undertaking" when assessing the abusiveness of a refusal to supply.[304] Referring to *Magill*, it emphasized the element of "exceptional circumstances" for an exercise of IPRs to constitute an abuse.[305]

Based on *Magill*, the ECJ formulated the following criteria for assessing the anti-competitiveness of the refusal in question:

(1) The likeliness of excluding all competition on the part of the refused undertaking in the market it intended to enter;
(2) The refusal not being able to be objectively justified, and
(3) The product in question being indispensable for the refused undertaking (in the sense of having no actual or potential substitute).[306]

Applying those criteria to this case, the ECJ found that, first, there existed substitutes for the distribution of daily newspaper,[307] and secondly, it was possible for an undertaking to establish an alternative distribution system.[308] Regarding the second finding, the ECJ further pointed out that the correct calculation of the viability of establishing an alternative system should take into account more than just the refused undertaking's perspective.[309]

301 Ibid., para 63.
302 Ibid., para 65.
303 Ibid., para 66.
304 Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I 7791, para 38 (hereinafter, "the ECJ ruling on *Bronner*").
305 Ibid., paras 39–40.
306 Ibid., para 41.
307 Ibid., para 43.
308 Ibid., para 44.
309 Ibid., paras 45–46.

2.9.7 IMS Health

2.9.7.1 The ECJ Ruling and the AG Opinion

Two Criteria for Determining Indispensability and Three Cumulative Conditions for Establishing an Abusive Refusal to License

This preliminary ruling case concerned a refusal to license by IMS to a subsidiary company of NDC. The German court submitted to the ECJ three preliminary questions,[310] which, according to the reconstruction of the ECJ and the AG, essentially revolved around two issues:

(1) The criteria that should be relied on to determine the indispensability of the withheld license,[311] and
(2) The conditions for a refusal (to grant an indispensable license) to constitute an abuse of dominance.[312]

Regarding the first issue, the ECJ referred to *Bronner* and highlighted the two criteria for determining the indispensability of a withheld product or service: (1) "whether there are products or services which constitute alternative solutions", and (2) "whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult" to create the alternative products or services.[313] On that basis, the ECJ agreed with AG opinion and ruled that, in this case, the level of participation by IMS's customers in developing the licensed structure and the outlay (particularly in terms of cost) should be taken into account for determining the indispensability of the withheld license, because they could induce a dependency by the customers regarding that structure.[314]

Regarding the second issue, the ECJ formulated the reasoning on the basis of *Magill* and *Bronner*. It clarified from the outset that according to these two precedents, a dominant undertaking's refusal to license as such is not abusive; instead, only in "exceptional circumstances" would such a refusal constitute an abuse.[315] On that basis, it elaborated the "exceptional circumstances" requirement into three cumulative conditions for a refusal to license to be found abusive:[316]

(1) The refusal prevents the emergence of a new product,
(2) It is unjustified, and
(3) It excludes all competition on a secondary market.

310 Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I 5039, para 17 (hereinafter, "the ECJ ruling on *IMS Health*").
311 Ibid., paras 23–24.
312 Ibid., paras 21–22.
313 Ibid., para 28.
314 Ibid., paras 29–30.
315 Ibid., paras 34–37.
316 Ibid., para 38.

The ECJ agreed with the AG opinion that, distilled from Condition (1), for a refusal to license to constitute an abuse, there is an requirement that the refused undertaking must intend to develop a new product by using the withheld license, instead of simply duplicating the already existing product.[317] Concerning Condition (3), it followed *Bronner* and held that the identification of two separate markets is necessary.[318] However, the ECJ agreed with the AG opinion that the two separate markets need not to be identified in a strict "market definition" sense; it would suffice if they can be identified potentially or hypothetically, for example as "two stages of production".[319]

2.9.8 Microsoft

In this case, the Commission accused Microsoft of abusing it dominant positions in the market for PC operating systems and the market for work group server operating systems. Two abusive practices were identified: refusal to supply and tying.

This subsection deals with the first accusation, namely Microsoft's refusal to supply Sun the specifications for the protocols used by Windows work group servers.[320] Sun intended to use such specifications to provide work group server functions that were interoperable with the Windows domain architecture, particularly with the Windows client PC operating system.[321]

The Commission found dominance in both the market for client PC operating systems and the market for work group server operating systems. Such findings were mainly based on two considerations: very high market shares and significant barriers to entry,[322] with a particular emphasis on the "network effect" in those markets.[323]

2.9.8.1 The Commission's Theory of Harm

Two Aspects of Harm and a Theory Adhering to the Case Law

The harm of the refusal was described as the "negative impact on consumer welfare". The Commission alleged that harm from two aspects: (1) *the limitation on technical development* to the prejudice of consumers, as stipulated in Art 82(b) of the EC Treaty,[324] and (2) *the restriction of competition* as an indirect impairment of consumer welfare, because it resulted in the undermining of the effective competitive structure.[325]

317 Ibid., paras 48–49.

318 Ibid., para 42.

319 Ibid., paras 44–45.

320 Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), para 560, http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf (accessed November 13, 2018) (hereinafter, "the Commission decision on *Microsoft*").

321 Ibid., para 562.

322 Ibid., paras 429, 493–514.

323 Ibid., paras 449–64, 516–24.

324 Ibid., para 693.

325 Ibid., paras 694, 704.

The Commission constructed the theory of harm in accordance with the case law. As a start, it referred to precedents including *Commercial Solvents*, *Télémarkting*, *Magill*, *Tiercé Ladbroke*, *Bronner*, and *Volvo*, highlighting the "specific circumstances" requirement for a refusal (to license intellectual property rights by a dominant undertaking) to constitute an abuse.[326] On that basis, the Commission constructed the theory of harm that can be described as follows.

First, it examined the indispensability of the withheld protocol information. It did so by separating the refusal to provide "a full specification of the protocols underlying the Windows domain architecture", which was suspected abusive, from the refusal to provide other information, which fell outside the consideration of this case.[327] The Commission considered the withheld information (concerning interoperability with the Windows architecture) to be indispensable for Sun to compete in the work group server operating system market, because a crucial part of the work group server function was related to client PC operating systems, where Microsoft enjoyed dominance.[328] On that point, the Commission also gave its reasoning on why there were no real substitutes for the withheld information.[329] Along the line, the Commission also clarified that the information requested by Sun did not constitute source code. It did so by distinguishing "specifications" and "implementation": "an interface specification describes *what* an implementation must achieve, not *how* it achieves it".[330]

Secondly, the Commission assessed the elimination of competition caused by the refusal. In that regard, it found Microsoft's refusal to be part of a broader strategy of "not disclosing interoperability information to work group server operating system vendors",[331] so as to promote the attractiveness of Microsoft's own work group server operating system in terms of its operability with the prevailing Microsoft client PC operating system.[332] Taking a probable view on the elimination of competition,[333] the Commission listed evidence proving that Microsoft's increase in market shares was the result of successfully executing that strategy[334] and was an indication of competitors being marginalized.[335] According to the Commission, the very fact that customers perceived Microsoft's work group server operating system as the preferred option over other operating systems was already an indication of consumer harm, in the sense that those customers' choices were unduly influenced.[336]

326 Ibid., paras 547–59.
327 Ibid., para 566.
328 Ibid., paras 566–67, 586.
329 Ibid., paras 666–91.
330 Ibid., para 570.
331 Ibid., paras 575–77.
332 Ibid., paras 588, 638.
333 Ibid., para 622.
334 Ibid., paras 637–65.
335 Ibid., paras 591–636.
336 Ibid., para 706.

Implicitly, the Commission also addressed the other requirement referred to in *Magill*, *Bronner*, and *IMS Health*, namely the requirement of "preventing the emergence of a new product". It did so by claiming that the refusal in question limited technical development: according to the Commission, had the interoperability information been granted, there would have been products that brought additional value to Windows work group networks, and there was consumer demand for such a product.[337]

2.9.8.2 The CFI Judgment

Confirming the Analytical Framework

The CFI fully endorsed the Commission's findings of abuse. To begin with, the CFI addressed the question of "indispensability". In that regard, it first stated that the Commission's identification of the withheld information was correct.[338] On that basis, it examined whether the withheld information was indispensable for Sun, and found the answer to be affirmative.[339] In that process, it identified *competition foreclosure* as the core harm: according to the CFI, a manifestation of that harm would be the competitors of Microsoft not being able to stay viable in the market because of the lack of that withheld information.[340] It also dismissed Microsoft's concern that the interoperability information would be used for cloning Microsoft products.[341]

Subsequently, the CFI addressed the intersection of IPRs and competition protection. First, it presumed that the withheld information was covered by IPRs protection, and proceeded to discuss in what circumstances the protection of IPRs should give way to competition protection.[342] In that regard, it summarized the Commission's theory of harm and revisited the line of case law governing refusals to grant IPRs.[343] As a result, it distilled the three cumulative conditions for finding a refusal to grant IPRs abusive:

(1) The withheld information being indispensability,
(2) Having the result of competition restriction, and
(3) Having the result of preventing a new product from emerging.[344]

Overall, the CFI approved and refined the Commission's theory of harm concerning the refusal in question.

337 Ibid., paras 696, 700.

338 Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II 3601, para 206 (hereinafter, "the CFI judgment on *Microsoft*").

339 Ibid., paras 243–44.

340 Ibid., para 229.

341 Ibid., paras 240–42.

342 Ibid., paras 289–90.

343 Ibid., paras 316–31.

344 Ibid., paras 332–34.

The CFI carried out the rest of the assessment in accordance with these three conditions. Regarding the first condition, the CFI upheld the Commission's conclusion about the degree of interoperability that was indispensable for the competitors to remain viable.[345] Its ground was that, in terms of complex economic assessments where there is a margin of discretion, the Commission is subject to limited judicial review.[346] In that light, it dismissed Microsoft's counterarguments for insufficient substantiation.[347]

Regarding the second condition, the ECJ clarified that the "elimination of competition" requirement refers to *potential elimination*, and that it could just be *partial elimination*.[348] Subsequently, it confirmed the Commission's conclusion that the refusal in question had indeed caused the risk of all effective competition being eliminated, a risk that was revealed in the evolution of the market and aggravated by certain features of that market.[349]

The CFI approached the third condition in light of consumer welfare and within the context of Art 82(b), pursuant to the jurisprudence established in *Magill* and *IMS Health*.[350] It considered the refusal in question to have undermined consumer welfare because it compelled consumers to choose Microsoft's products over the competitors'.[351] The CFI observed that the competitors' products offered functions that were non-operability-related but were nonetheless valued greatly by consumers.[352] It also observed that, had the competitors been granted the interoperability information, they would have provided products with differentiated and advanced features.[353] In that sense, the "prevention of a new product" requirement was met.

Finally, the CFI examined the objective justifications raised by Microsoft. In that regard, it dismissed the argument that the withheld information should enjoy the exclusive protection of IPRs.[354] It also dismissed the argument that innovation would be greatly discouraged by the compelled disclosure, on the ground of insufficient substantiation.[355]

345 Ibid., paras 374, 422.
346 Ibid., para 379.
347 Ibid., paras 380–91.
348 Ibid., paras 561, 563.
349 Ibid., paras 618–19.
350 Ibid., paras 643–47.
351 Ibid., paras 652–53, 661–64.
352 Ibid., para 652.
353 Ibid., paras 654–55.
354 Ibid., paras 690–92.
355 Ibid., paras 697–701.

2.9.9 Sot Lélos

2.9.9.1 The ECJ Ruling and the AG Opinion

In this preliminary ruling case, GSK AEVE, a pharmaceutical producer in Greece, refused to supply some domestic distributors (Sot Lélos and others) that intended to engage in parallel exports to other Member States, where the prices of certain medical products were higher compared with Greece because of the different degrees of state intervention.[356] Eventually a preliminary reference was submitted to the ECJ, revolving around two questions: (1) Whether a refusal to supply by a dominant undertaking should be considered *per se* abusive if it is aimed at limiting parallel trade in a sector where state intervention has made pure competition impossible? (2) If the answer to the first question is negative, how should the refusal be assessed under Art 82?[357]

Market Integration Embedded in the Structural Conception of Competition Exclusion

The ECJ started answering the first question by revisiting the relevant case law. Referring to *Commercial Solvents* and *United Brands*, it stated that a refusal to supply *an existing customer* would constitute abuse if it eliminates a trading party as a competitor.[358] In that sense, the central concern was obviously the harm of *competition foreclosure*,[359] along with some other side concerns such as market limitation to the prejudice of consumers and discrimination of customers.[360]

It also introduced "market integration" as a source of harm. Referring to precedents like *General Motors*, *British Leyland*, and *X*, it held that a refusal to supply an existing customer with the *aim* of restricting parallel trade should be considered as presumptively abusive.[361] The underlying notion was that parallel trade in and by itself promotes competition and benefits end consumers.[362] In that sense, one could say that the ECJ construed the harm to *market integration* as intertwined with the harm of competition foreclosure from a structural perspective. The AG proposed that intertwining conception.[363]

356 Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I 7139, paras 9–11 and 23 (hereinafter, "the ECJ ruling on *Sot Lélos*").

357 Ibid., para 23.

358 Ibid., para 34.

359 Ibid., para 35.

360 Ibid., para 49.

361 Ibid., para 37.

362 Ibid., paras 52–57.

363 Opinion of Advocate General Ruiz-Jarabo Colomer (delivered on April 1, 2008) in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I 7139, para 53 (hereinafter, "the AG opinion on *Sot Lélos*").

Raising objective justifications could overturn that presumption of abuse.[364] The first possible justification is an undertaking's right to defend its legitimate commercial interests. In that regard, the ECJ agreed with GSK AEVE's reference to *United Brands*.[365] This precedent essentially required a balance to be struck between the preservation of competition and a dominant undertaking's right to defend its legitimate commercial interests.[366] The ECJ's way of striking that balance included two aspects of consideration: (1) the principle of proportionality, in the sense that the steps taken to defend such interests must be *reasonable*, and (2) the element of subjectivity, in the sense that a defensive refusal cannot be accepted "if its purpose is specifically to strengthen that dominant position and abuse it".[367] The ECJ did not explain any further how to integrate the finding of such a purpose into the theory of harm, but the AG explained it to a certain extent: according to the AG, subjective elements are often indicators of "probable anticompetitive effects", which are the legally required threshold for proving the abusiveness.[368]

The second possible justification was the presence of state intervention, which was a particular aspect of the case circumstances. The ECJ held that, on the one hand, the presence of state intervention could not excuse a limitation on parallel trade from being examined under Art 82 of the EC Treaty.[369] This is because state regulation does not have the original purpose or the effect of removing competition entirely;[370] it is also because of the objective of "ensuring that competition in the internal market is not distorted", as demonstrated in the *per se* rule of illegality in the case law under Art 81 of the EC Treaty.[371] On the other hand, it held that, in this case, a refusal jeopardizing parallel trade could not be deemed as *per se* abusive/illegal anymore. This was because such parallel trade dynamics were born out of the very existence of state intervention (as opposed to natural competition).[372] Therefore, a balanced approach pursuant to *United Brands* appeared necessary. Eventually, the ECJ suggested that such a balancing should focus on whether the refused orders from the customers were "out of ordinary",[373] which was a matter to be ascertained by the national authority.[374]

364 The ECJ ruling on *Sot Lélos*, para 39.
365 Ibid., para 40.
366 Ibid., para 49.
367 Ibid., para 50.
368 The AG opinion on *Sot Lélos*, paras 48–51.
369 The ECJ ruling on *Sot Lélos*, para 66.
370 Ibid., paras 58–64.
371 Ibid., para 65.
372 Ibid., paras 67–69.
373 Ibid., paras 70, 77.
374 Ibid., para 73.

2.10 Margin Squeeze

2.10.1 Deutsche Telekom

2.10.1.1 The Commission's Theory of Harm

DT was an operator of fixed telecommunication networks and was subject to sector-specific regulations of the EC and Germany. The Commission characterized the abuse of dominance in question as "margin squeeze", which "generated by a disproportion between wholesale charges and retail charges for access to the local network".[375]

There were two relevant markets: the German *wholesale* and *retail* markets for local access to fixed telecommunications networks.[376] The wholesal market was the upstream market of the retail market.[377] The Commission found DT to be dominant in both markets.[378]

The Harm of Competition Foreclosure

The harm alleged by the Commission was *competition foreclosure* in the downstream market by means of raising rivals' input costs. The anticompetitive concern was that those rivals would be excluded from competition, "even if they are at least as efficient as the established operator".[379] Supposedly, the exclusion would be achieved by imposing on competitors "additional efficiency constraints which the incumbent does not have to support in providing its own retail services".[380]

The Margin Squeeze Test

The Commission stated that the key element for identifying an abusive margin squeeze is the *competition-restrictive disproportion* between the two sets of charges (the wholesale charges to competitors in the downstream market and the direct retail charges to end-users).[381] Accordingly, there would be an abusive margin squeeze if the difference between the retail prices and the wholesale prices were "negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market".[382] In line with the logic that the anticompetitiveness of a margin squeeze scheme derives from the disproportion of the two sets of prices, the Commission did not examine the abusiveness of the retail charges as such.

375 2003/707/EC: Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG), [October 14, 2003] OJ L 263, para 57 (hereinafter, "the Commission decision on *Deutsche Telekom*").

376 Ibid., paras 58–59.

377 Ibid., paras 61–62.

378 Ibid., paras 96–101.

379 Ibid., para 108.

380 Ibid., para 141.

381 Ibid., para 105.

382 Ibid., para 107.

Another key element in the margin squeeze test is the existence of *a downstream market* in which the upstream dominant undertaking competes with other providers of the same kind of retail product or service. As the Commission put it,

> It has therefore to be considered whether the established operator's retail and wholesale services are comparable, in the sense that their technical features are the same or at least similar and that they allow the same or at least similar services to be provided.[383]

The premise of this margin squeeze test is that, in a scenario where an operator, such as DT, is vertically integrated and dominantes the wholesale market, its competitors in the downstream retail market bear two distinguishable sets of costs: (1) the wholesale charges by DT (as input costs), and (2) the specific downstream (retail) costs.[384] The principle is that the wholesale charges by this upstream dominant operator "must enable comeptitors to compete with that operator effectively, and at least to replicate the established operator's customer pattern".[385]

To carry out this test, the Commission in this case adopted a weighed approach to assessing the prices and costs. It formulated the test into two tiers:

- If the average retail prices are below the level of the wholesale charges, it can be concluded that there is a margin squeeze;
- If the average retail prices are above the level of the wholesale charges, the established operator's "product-specific costs for providing its own retail service" must be considered.[386]

While the first tier is rather straightforward, the second tier needs further clarification. In that regard, the Commission reasoned that the second tier is to compare "the extent of the positive spread between the retail charges and the wholesale charges" with "the product-specific costs of providing the product or service in question to end-users". If the latter is larger, there is an abusive margin squeeze, because this indicates that an undertaking that is at least as efficient as the dominant one would not be able to cover its costs in providing the product or service in question.[387]

The Commission carried out this test on DT. It found DT's pricing schemes from 1998 to 2001 to be abusive in accordance with the first tier of the test, and the pricing schemes after

383 Ibid., para 109.
384 Ibid., para 114.
385 Ibid., para 127.
386 Ibid., para 111.
387 Ibid., paras 138–39.

2002 to be abusive in accordance with the second tier.[388] Additionally, it found that even with the regulatorily imposed price cap, DT still had an extent of commercial discretion, which enabled DT to satisfy the "autonomous undertaking" criterion for the application of Art 102.[389] Also, pursuant to the objective conception of "abuse" established in the case law, the Commission considered that the existence of a margin squeeze was engouh proof of an abuse, and thus no anticompetitive effect should be required.[390] Nonetheless, it carried out a brief verification of such effects as an alternative.[391]

2.10.1.2 The CFI and the ECJ Judgments

DT appealed to the CFI, which issued its judgment on April 10, 2008. It ruled in complete favor of the Commission.[392] DT appealed again to the ECJ, which issued the final judgment on October 14, 2010.[393] The ECJ upheld the CFI judgment in its entirety. The following issues that pertained to the theory of harm at hand were distilled and examined by the two Courts.

The Relevance of the Margin Squeeze Test and the Underlying Foreclosure Harm

DT appealed to the CFI, claiming that, since the German authority fixed the whole charges, there could be an abusive margin squeeze only if the retail charges as such were abusive (as predatory pricing).[394] It argued that the Commission decision was wrong for not proving the predatory nature of the retail charges before finding an abuse. The CFI dismissed this argument, on the ground that the abusiveness of the margin squeee in question derived from the "unfairness of the spread" between the wholesale charges and the retail charges.[395]

The ECJ thoroughly examined this issue. It upheld the CFI's reasoning, and made it clear that the abusiveness of a margin squeeze scheme does not depend on the predatory nature of the retail prices; nor does it depend on the excessiveness of the wholesale prices.[396]

DT argued before the ECJ that, in the event of the whole prices being fixed and according to the Commssion's margin squeeze test, it was caught in a dilemma where it would either have to keep the existing retail price level—which resulted in a finding of abusive margin squeeze by the Commission and the CFI, or it would have to increase the retail prices to

388 Ibid., paras 154, 160.

389 Ibid., para 169.

390 Ibid., paras 178–80.

391 Ibid., paras 181–83.

392 Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* [2008] ECR II 477 (hereinafter, "the CFI judgment on *Deutsche Telekom*").

393 Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I 9555 (hereinafter, "the ECJ judgment on *Deutsche Telekom*").

394 The CFI judgment on *Deutsche Telekom*, para 153.

395 Ibid., para 167.

396 The ECJ judgment on *Deutsche Telekom*, paras 168–69, 183.

the detriment to its end-uers—which it perceived as possibly anticompetitive.[397] The ECJ considered this dilemma to be fallacious and thus not able to nullify the margin squeeze test. This is because the relevance of the margin squeeze test derives from the factually established "unfairness of the spread", which is directly linked with the foreclosure harm envisaged by the ECJ.[398]

The Adequacy of the Calculating Method

DT also argued before the CFI and the ECJ that the Commission was wrong in carrying out the margin squeeze test for (1) considering only DT's own price-and-cost structure, while overlooking the situations of its competitors, and (2) excluding renenues from certain call services and other telecommunication services when calculating the level of the retail charges.[399]

The CFI found no problem in the Commission's focus on DT's own price-and-cost structure. It provided two grounds of reasoning. First, pursuant to precedents such as *AKZO*, it is the principle to focus on the dominant undertaking's own price-and-cost structure when assessing the abusiveness of its pricing practices.[400] Secondly, not having this focus would violate the general principle of legal certainty, as an undertaking does not have access to other undertakings' price-and-cost structures and thus would not be able to self-assess the legality of its practices.[401] The ECJ fully supported this reasoning. Additionally, it clarified that the focus on the price-and-cost structure of a dominant undertaking is inherent in the "as efficient competitor" rationale, which is then inherently linked with the envisaged foreclosure harm of pricing practices.[402]

The CFI found no problem in the exclusion from consideration of revenues from non-access-related services either. In that regard, it provided two grounds: "the Community-law principle of tariff rebalancing," and the consideration on "equality of opportunity".[403] The ECJ upheld the CFI's reasoning.[404]

The "Anticompetitive Effect" Requirement

The Commission dismissed the necessity of proving the "anticompetitive effect" before finding the margin squeeze in question abusive. The CFI disagreed. It held that the Commission is required to prove the anticompetitive effect before finding an abuse of

397 Ibid., para 179.
398 Ibid., paras 175–78, 181–82.
399 The CFI judgment on *Deutsche Telekom*, para 183; the ECJ judgment on *Deutsche Telekom*, paras 187–92.
400 The CFI judgment on *Deutsche Telekom*, paras 188–89.
401 Ibid., para 192.
402 The ECJ judgment on *Deutsche Telekom*, paras 198–200.
403 The CFI judgment on *Deutsche Telekom*, paras 197–99.
404 The ECJ judgment on *Deutsche Telekom*, paras 226, 233.

dominance.[405] Nonetheless, the CFI found no assessment error made by the Commission. This is because the CFI construed the "anticompetitive effect" element as the "possible barriers" of foreclosure, which was obviously present (and thus needed no further proof) in the case circumstances and in accordance with the analytical framework that includes the objective conception of abuse and the structural conception of the foreclosure harm.[406] The ECJ agreed with the CFI.[407]

2.10.2 TeliaSonera

This was a preliminary case that the ECJ handled in 2011. The undertaking in question was TeliaSonera, a Swedish fixed telephone network operator. It offered a wholesale product to operators that provided broadband connection services to end-users; meanwhile, it also offered broadband connection services directly to end-users.[408] The Swedish competition authority accused TeliaSonera of abusing its dominant position in the form of margin squeeze in relation to these two businesses. When processing this case, the Stockholm District Court made a preliminary reference to the ECJ.[409] It asked for clarifications concerning the circumstances for finding an abusive margin squeeze; more specifically, it asked the ECJ to rule on the relevance of a list of criteria it proposed.[410]

2.10.2.1 The ECJ Ruling

The Harm of Competition Foreclosre and the Key Element for Identifying an Abusive Margin Squeeze

The ECJ started the preliminary ruling by clarifying the legal objective underlying Art 102 of the TFEU: to ensure that competition is not distorted, as stipulated in Protocol 27. In that light, it considered the EU competition law regime, including Art 102, as an essential instrument to achieve the wider objective of estalibhsing an internal market.[411]

Subsequently, the ECJ reiterated the classic definition of "dominance" established in the precedents and the "special responsibility" concept ensued from a dominance finding.[412] Accordingly, it accentuated the harm of *competition foreclosure* that was relevant in this case, in the sense that a competition-foreclosing practice violates the special responsibility of a dominant undertaking and harms consumers indirectly, and thus must be prohibited.[413]

405 The CFI judgment on *Deutsche Telekom*, paras 234–35.

406 Ibid., paras 233, 237.

407 The ECJ judgment on *Deutsche Telekom*, paras 252, 254.

408 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I 527, paras 6–7 (hereinafter, "the ECJ ruling on *TeliaSonera*").

409 Ibid., paras 8–9.

410 Ibid., para 19.

411 Ibid., paras 20–21.

412 Ibid., paras 23–24.

413 Ibid., para 24.

It then reiterated the objective conception of "abuse" and the entailed "all circumstances" analytical framework for assessing the abusiveness of a pricing practice.[414]

The ECJ also emphasized the source of abusiveness of a margin squeeze: the unfairness of the spread between the two sets of prices.[415] Following the *Deutsche Telekom* judgment, it clarified the threshold for finding an abusive margin squeeze: "Anticompetitive effect" (or more specifically, the exclusionary effect on as-efficient competitions) is a required element. Nonetheless, the ECJ considered that such an anticompetitive effect is so inherent in the very existence of a margin squeeze that no further proof of effect should be required.[416] The ECJ pointed out the reason why an anticompetitive effect is deemed inherent in the existence of a margin squeeze—or in its own words, why the unfairness "is linked to the very existence of the margin squeeze": the as-efficient-competitor rationale.[417] Related to this clarification, the ECJ made it clear that the abusiveness of a margin squeeze does not depend on the abusiveness of the wholesale prices or the retail prices as such.[418]

The Criteria to Be Considered

The ECJ discussed the relevance of each criterion proposed by the Stockholm District Court for finding a margin squeeze abusive.

The first one is the prices and costs of the competitors. The ECJ considered this criterion to be generally irrelevant. It listed two reasons: the as-efficient-competitor rationale and the consideration on legal certainty.[419] In that regard, references were made to *Deutsche Telekom* and *AKZO*. However, by taking a more nuanced look at the possible case scenarios, it made the concession that, in particular circumstances where the price-and-cost structure of the dominant undertaking could not be precisely identified, the situations of the competitors may be relevant.[420]

The second criterion is the regulatory obligation to supply. The question was whether the absence of regulatory obligations to supply would prevent the finding of an abusive margin squeeze. This issue is essentially related to the distinction between two types of abuses: margin squeeze and refusal to supply. The ECJ considered them to be two separate categories of abuse, and therefore the conditions for finding an abusive refusal to supply—particularly the balancing of competition preservation and an undertaking's freedom to deal—do not apply for finding an abusive margin squeeze.[421] The ECJ found this criterion irrelevant.

414 Ibid., paras 27–28.
415 Ibid., para 30.
416 Ibid., para 31.
417 Ibid., paras 32–34.
418 Ibid., para 34.
419 Ibid., paras 38–44.
420 Ibid., paras 45–46.
421 Ibid., paras 55–56.

The third criterion is the indispensability of the wholesale product. In that regard, the ECJ first stressed that no concrete anticompetive effect is necessary for finding an abusive margin squeeze.[422] This is because the anticompetitive effect is inherent in a margin squeeze scheme. The ECJ referred to this inherent anticompetitive effect as "the possible barriers", or more specifically, as the possible exclusion of as-efficient competitors.[423] To ascertain such inherent anticompetitive effect, the ECJ prescribed several "must consider" elements for the referring court to examine under the "all circumstances" analytical framework.[424] The first "must consider" element is the indispensability of the wholesale product.[425] However, the ECJ immediately added that, in the event that the wholesale product is not indispensable, there could still be an inherent anticompetitive effect.[426] This is because of the dominant position of the undertaking in the wholesale market.[427] The second "must consider" element is the marginal level between the wholesale price and the retail price. Whether that margin is positive or negative would determine whether a rule of reason should be applied for ascertaining the inherent anticomeptitve effect.[428]

Other criteria include the importance of market strength, the extent of the dominant position, the fact that the supply concerned is to a new customer, the opportunity to recoup lossess, and the fact that the markets concerned feature new technology. The ECJ considered all of them, as a general rule, irrelevant for the finding of an abusive margin squeeze.[429]

2.11 Tying

2.11.1 Microsoft

2.11.1.1 The Commission's Theory of Harm

A Four-Step Theory of Harm

The second abuse in *Microsoft* was tying. The Commission considered Microsoft's tying of its streaming media playing product (WMP) with its client PS operating system (Windows 98 and subsequent versions) to be abusive.[430] It identified the core harm to be *the foreclosure of*

422 Ibid., para 64.

423 Ibid., paras 62–63.

424 Ibid., paras 69–77.

425 Ibid., para 70.

426 Ibid., para 72.

427 This is in contrast with AG Mazák's opinion. He considered "the indispensability of the wholesale product", or alternatively, "the regulatory obligation to supply", to be a necessary condition for finding a margin squeeze abusive. See Opinion of Adovate General Mazák (delivered on September 2, 2010) in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I 527, paras 11, 19–21, 29–30.

428 The ECJ ruling on *TeliaSonera*, paras 73–74.

429 Ibid., paras 78–111.

430 The Commission decision on *Microsoft* (note 320 above), para 793.

competition,[431] with supplementary concerns including *the limitation of consumer choice*[432] and *the stifling of innovation*.[433]

The Commission constructed the theory of harm pursuant to Art 82(d) of the EC Treaty. It pointed out the four requirements for a tying to be abusive: (1) the tying and tied products are two separate ones; (2) the undertaking is dominant in the tying product market; (3) customers are not given a choice to obtain the tying product without the tied one; and (4) the tying in question forecloses competition.[434] The Commission carried out its examination by following these four steps. Since the first and second steps were done in the definition of markets and the findings of dominance, the third and fourth steps took the center stage of the abuse analysis.

Regarding the third step, the Commission emphasized the element of "coercion", in the sense that Microsoft did not offer any versions of the Windows systems that was free of WMP, nor did it provide the option of completely un-installing WMP.[435] The Commission considered this coerciveness to be anticompetitive because it constituted the "supplementary obligation" within the meaning of Art 82(d).[436] The underlying logic was that the coercion caused the harm of customer choice limitation, as it enabled Microsoft to dictate the kinds of pre-installed media player in a Windows operating system.[437]

Regarding the fourth step, the Commission's view was that the limitation on customer choice subsequently entailed the foreclosure of competition, which was the first and foremost harm of the tying in question.[438] The Commission's conception of the foreclosure harm was consistently structural and probable: it considered that, because of Microsoft's ubiquitous position in the client PC operating system market, the tying afforded WMP a ubiquitous market presence, which could be translated to a "significant competitive advantage" and would negatively alter the competitive structure of the tied product market due to the network effects of that ubiquity.[439] In the examination process, the Commission dismissed Microsoft argument that downloading offered other media player providers an effective alternative to reach the customers, by suggesting that the network effect of the market made such an alternative inferior.[440] In line with that logic, it also introduced the concern

431 Ibid., para 832.
432 Ibid., para 828.
433 Ibid., para 842.
434 Ibid., para 794.
435 Ibid., paras 827, 829.
436 Ibid., para 831.
437 Ibid., para 809.
438 Ibid., paras 831–32.
439 Ibid., paras 832, 842, 851, 863, 877–78.
440 Ibid., paras 861, 863–66.

for the inhibition of market innovation,[441] and the concern that there would be spillover anticompetitive outcomes in adjacent markets if Microsoft continued monopolizing the media player market.[442]

In an effort to dismiss Microsoft's defense that the tying was overall pro-competitive, the Commission weighed the anticompetitive effects it had found against the pro-competitive effects alleged by Microsoft. In its weighing, the concern for "limitation of choice" played a major role, in the sense that the Commission required that the pro-competitive outcomes of tying must not prejudice consumers' freedom of choice in order to be acceptable.[443] A second point in that weighing was that, aside from the issue of whether Microsoft had substantiated its efficiency defenses, the tying in question was not indispensable to achieve the efficiencies alleged by Microsoft.[444]

The Commission also dismissed Microsoft's defense that the success of WMP was simply the result of competition on the merits.[445] Here, a subtle point was that, after proving the existence of foreclosure, the Commission showed a tendency to *presume* the causal link between the harm of competition foreclosure and the decline of RealNetworks (a competing media player product), as opposed to presuming a link between the decline and merit-based competition.[446] Admittedly, the Commission managed to draw from factual findings that there was no evidence suggesting a link of the latter,[447] but in the same vein it could also be argued that these facts did not necessarily support a causal link of the former.

2.11.1.2 The CFI Judgment

Validating the Four-Step Theory of Harm

The CFI upheld the Commission's four-step theory of harm on tying.[448] It considered this theory of harm to be in conformity with Art 82(d).[449] The CFI considered the second condition to have been met in the Commission's findings of dominance,[450] therefore focusing on the other three conditions in the remaining parts of the judgment.

Regarding the first condition, the CFI noted that the rapid evolution of the IT industry could make two initially separate markets merging as one; therefore, to distinguish the two separate products, the time reference should go back to when the impugned conduct

441 Ibid., paras 832, 842.
442 Ibid., para 899.
443 Ibid., para 956.
444 Ibid., paras 963, 967.
445 Ibid., paras 947–48.
446 Ibid., para 948.
447 Ibid., paras 949–51.
448 The CFI judgment on *Microsoft* (note 338 above), paras 842, 859, 869.
449 Ibid., paras 861–63.
450 Ibid., para 870.

became harmful.[451] Moreover, it agreed with the Commission that the key to distinguishing the two separate products (including complementary ones) is "customer demand".[452] On that basis, the CFI found a series of facts supporting the existence of separate consumer demands for the two products.[453]

Regarding the third condition, the CFI observed that the coercion was applied to original equipment manufacturers both contractually and technically,[454] and that the coercion was ultimately passed on to end users.[455] In line with that logic, it dismissed Microsoft's arguments that the tying was not subject to extra charge, that consumers were not required to actually use the function, and that the changes made under the US settlement were enough to solve the anticompetitive concern.[456]

Regarding the fourth condition, the CFI described the Commission's assessment of competition foreclosure from two aspects and as three stages. The two aspects were "the actual effects which the bundling had already had" and "the way in which that market was likely to evolve".[457] The three stages were as follows: analyzing the existing foreclosure condition,[458] discussing likely impact on content providers and software designers,[459] and envisaging the evolution of the market.[460]

Last, the CFI examined the objective justifications. In that regard, it found Microsoft to have failed to establish any objective justifications pursuant to the required burden of proof.[461]

2.12 Loyalty Rebates

2.12.1 Suiker Unie

2.12.1.1 The Commission's Conception of Harm

Concerns for Discrimination and Market Integration

The granting of fidelity rebates was the second abusive conduct in this case.[462] The Commission considered the rebate scheme to have caused two sets of harm: *discrimination* of customers and *impediment to market integration*.

451 Ibid., para 914.
452 Ibid., paras 917, 920–21.
453 Ibid., para 925.
454 Ibid., para 963.
455 Ibid., para 964.
456 Ibid., paras 967, 970, 972.
457 Ibid., para 1035.
458 Ibid., paras 1037–54.
459 Ibid., paras 1060–77.
460 Ibid., paras 1078–88.
461 Ibid., para 1167.
462 The Commission decision on *Suiker Unie* (note 84 above), 39.

Its harm analysis was brief. First, it held that the rebates constituted "an unjustifiable discrimination against buyers who also buy sugar from sources other than SZV".[463] Secondly, it found the rebates in question to have the effect of possibly enabling SZV to control the customers' purchases from foreign producers, after it ascertained the attractiveness of the yearly rebate. As a concluding remark, the Commission implied that rebates of the kind in question should be *per se* illegal.[464] The underlying concern was that such rebates could serve the *aims* of limiting opportunities for imports and strengthening the dominant position.

2.12.1.2 The AG Opinion and the ECJ Judgment

The Prioritized Concern for Market Integration

The AG invoked second paragraph (c) of Art 86 of the EEC Treaty for alleging the harm of SZV's rebate scheme.[465] However, just as the analysis on the restriction of resale, the AG did not explain how the competitive situation was impaired by the discrimination of those trading partners. In that sense, the concern for discrimination was farfetched and suggested a tucked concern for market integration.

The ECJ's assessment of the rebate scheme was slightly more detailed. First, it introduced the notion of "dissuasive effect". It indicated that, through the grant of a financial advantage, such rebates were designed and likely to have the effect of preventing "customers obtaining their supplies from competing producers".[466] On that basis, the ECJ referred to second paragraph (c) of Art 86, seemingly indicating that part of the harm was discrimination;[467] meanwhile, it acknowledged but intentionally sidestepped the issue brought up by SZV that the discrimination had not caused any competitive disadvantages.[468] Subsequently, the ECJ referred to second paragraph (b) of Art 86, suggesting that the rebates in question limited markets, to the detriment of the Common Market.[469] In that sense, the harm to market integration appeared to be the ECJ's primary concern.

2.12.2 Hoffmann-La Roche

2.12.2.1 The Commission's Theory of Harm

Three Sets of Harm and a Short Theory

The Commission found Roche's rebate schemes to have constituted abuses of dominance. It alleged three sets of harm:

463 Ibid., 39–40.

464 Ibid., 40 ("If a fidelity rebate of this kind is granted by an undertaking which holds a dominant position in order to limit opportunities for imports still further and to strengthen that dominant position, it constitutes an abuse, which is likely to affect trade between Member States.").

465 The AG opinion on *Suiker Unie* (note 88 above), 2110.

466 The ECJ judgment on *Suiker Unie* (note 94 above), para 518.

467 Ibid., para 523.

468 Ibid., para 524.

469 Ibid., para 526.

(1) Hampering the *freedom of choice* of the purchasers,
(2) Output-foreclosure of competition (as a result of the hampering of the freedom), and
(3) Discrimination of the purchasers.[470]

Regarding the first two allegations of harm, the Commission observed that they derived from the fact that the rebate schemes had the desired *object* of inducing, either by express obligation or by providing financial incentives, the customers to buy all or a large proportion of their requirements from Roche.[471] Based on its observations of other relevant facts (including the price advantages that were not based on cost savings, the aggravating "across-the-board" rebates, and the limited applicability of the "English clause"),[472] the Commission presumed that the desired object was effectuated. The idea was that the exclusivity of the rebate schemes "by its very nature removes all freedom of choice from purchasers" and consequently interfered with competition between vitamin manufacturers due to "the abandonment by its purchasers of their opportunities to obtain substantial proportions of their requirements from competitors".[473] Therefore, it concluded that, in light of Art 3(f) of the EEC Treaty, the exclusivity of the rebate schemes amounted to an abuse.

Regarding the third harm allegation, the Commission stated that the rebate schemes infringed Art 86(c) of the EEC Treaty in particular, simply because the rebates resulted in discriminatory prices granted to different customers.[474]

2.12.2.2 The AG Opinion

Constructing a Structure-Based Theory with Strong Presumptions and Distinguishing Two Types of Rebates

The AG agreed with the three harm allegations by the Commission, and added a new one: *the structural strengthening of the dominant position*.[475] On that basis, the AG constructed a theory of harm that was more elaborate and more structure-based than the Commission's.

This structural emphasis started with the finding of dominance. By suggesting that an abuse of dominance results in "the possibility of preventing effective competition and in consequence of reinforcing the relationship between supplier and customer, leading to

470 76/642/EEC: Commission Decision of 9 June 1976 relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020 – Vitamins), [August 16, 1976] OJ L 223, para 22 (hereinafter, "the Commission decision on *Hoffmann-La Roche*").

471 Ibid., para 23.

472 Ibid., para 22.

473 Ibid., para 24.

474 Ibid.

475 Opinion of Mr Advocate General Reischl (delivered on September 19, 1978) in Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, 584 (hereinafter, "the AG opinion on *Hoffmann-La Roche*").

the consolidation and strengthening of an already dubious position of dominance on the market",[476] the AG indicated that a dominant position itself should trigger some alert. The AG expressed this view more clearly when shedding light on the logical link (or the lack thereof) between "dominance" and "abuse": for a practice to constitute an abuse, it does not necessarily have to be an exercise of the market power possessed by a dominant undertaking; rather, it will do as long as the practice is carried out by a dominant undertaking and results in structural impediment to competition.[477] In that regard, by providing no further explanation, the AG seems to have seen no internally qualitative difference between *abusive conduct* and *normal competitive behavior* of a dominant undertaking; the only way to distinguish them and to determine their legality is resorting to the external criterion of "impact on market structure".

Subsequently, the AG distinguished two types of rebates according to their forms: the ones that impose express exclusivity obligations[478] and the ones offering financial incentives to induce exclusive supplies.[479] Regarding the first type of rebates, he pointed out that the manifested level of exclusivity had three sets of harm: limiting freedom of choice, output-foreclosure of competitors, and the strengthening of the dominant position.[480] Relying on the form-based dissection of rebates and the structural conception of harm, the AG dismissed Roche's argument that a "weighing-up of the interests" of the involved parties should be performed before declaring the exclusive obligation illegal. This dismissal was based on the ground that it was questionable whether such a weighing "may be regarded as an established legal view of Article 86".[481] According to the AG, Roche's only possible defense lay in whether the customers had any real freedom to escape this exclusivity obligation.[482] In that regard, the AG examined the English clause in question and reached a negative answer.[483]

Regarding the second type of rebates, namely the rebates that did not have express obligations but had loyalty incentives, the AG held the view that they were practically the same as the first type of rebates, because their designed loyalty-inducing mechanism enabled them to carry out the same restrictive function.[484] A similar examination was performed as to whether the English clause effectively afforded customers the freedom to

476 Ibid., 583.

477 Ibid. ("the criterion is not the exercise of market power but that there is abuse where an undertaking in a dominant position influences the structure of competition by its acts"). See also note 81 above.

478 Ibid., 584.

479 Ibid., 586.

480 Ibid., 584.

481 Ibid., 584–85.

482 Ibid., 585.

483 Ibid., 586.

484 Ibid. ("if advantages in relation to supply are granted in respect of customer loyalty and not on the basis of cost savings to the supplier, there is a compulsion very similar to that exerted by an express tie").

choose, and the answer was negative, because, according to the AG, eventually it was still Roche who decided on "the possibility of obtaining supplies from third parties".[485]

In an effort to dismiss Roche's argument that the Commission should have examined the circumstantial effects of the rebates in question before adopting the decision, the AG stated that "the wording of the contracts and the effects which accordingly it was reasonable to assume would ensue" were enough for the anticompetitive assessment.[486] In other words, according to the AG, anticompetitive effects could to a large extent be *presumed* based on the exclusivity obligations. The AG's justification for this presumption was that "it may be assumed that contractual clauses, which to some extent were obviously the subject of tough bargaining, were of some practical significance".[487] In other words, this presumption was built on a distrustful view on the dominant position. However, the AG did not provide any further explanations or grounds as to what justified this distrustful view against the supposedly non-prosecutable nature of possessing a dominant position.

Separately, the AG considered the discrimination of customers to be a second abuse. In that regard, he was strict by stating that discrimination within the meaning of Art 86(c) did not necessarily have to undermine a customer's competitive capacity.[488] In that sense, the AG seems to be directing the concern underlying Art 86(c) towards *fairness*, instead of directly competition-related concerns.

2.12.2.3 The ECJ Judgment

A Structural and Form-Based Theory of Harm to Loyalty Rebates

Similar to the theory of harm proposed by the AG, the ECJ's theory of harm in this case was also structure-based. This was exemplified first in the finding of dominance, where the ECJ made the following ruling:

> However if there is a dominant position then retention of the market shares may be a factor disclosing that this position is being maintained, and, on the other hand, the methods adopted to maintain a dominant position may be an abuse within the meaning of Article 86 of the Treaty.[489]

This statement is a direct reflection of the structure-based anticompetitive assessment rationale, in the sense that it does not discuss the wrongfulness or abusiveness of the so-called "methods" beforehand, nor does it provide any further qualifiers for judging these

485 Ibid., 588.

486 Ibid., 589.

487 Ibid.

488 Ibid., 592.

489 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, para 44 (hereinafter, "the ECJ judgment on *Hoffmann-La Roche*").

methods; instead, it seems to presume that the maintaining of dominance would result in anticompetitive outcomes, and therefore whatever methods employed to maintain that dominance should be brought to an end under the Treaty provision that is now Art 102 TFEU.

Moving on to the findings of abuses, first the ECJ highlighted two sets of competitive harm:

- *Output-foreclosure of competition*, resulted from the limitation on the customers' freedom of choice, and
- *Distortion of secondary-line competitive relations* because of the discriminatorily granted rebates.[490]

The ECJ's wording suggested that it intended to prioritize concerns that were directly competition-related, while downplaying supplementary and intermediary concerns such as discrimination and freedom of choice.

Subsequently, the ECJ categorized the rebate contracts at issue into three kinds: (1) the ones imposing a specific obligation to obtain exclusively from Roche, (2) the ones incentivizing customers to obtain all or a fixed percentage of their requirements from Roche, and (3) the contracts concluded with Merck and Unilever.[491]

Regarding the first kind of contracts, the ECJ adopted a *per se* rule of illegality: it stated that, discounts granted or not, it would constitute an abuse of dominance if a dominant undertaking imposed on its customers an obligation to obtain all or most of their requirements exclusively from the said undertaking.[492] The underlying concerns included the following: the limitation of freedom of choice, the consequent output foreclosure, the discrimination under Art 86(c), and the strengthening of dominance by means of a distorted form of competition.[493] These four concerns were similar to the ones pointed out by the AG.[494]

The structural approach to constructing a theory of harm was clearly exemplified by the classic ruling concerning the objective conception of abuse and the implication of a finding of dominance in paragraph 91:

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse

490 Ibid., para 80.
491 Ibid., paras 82–85.
492 Ibid., para 89.
493 Ibid., para 90.
494 The AG opinion on *Hoffmann-La Roche*, 584, 592.

> to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[495]

This statement construes dominance as the possession—not the exercise—of market power, but it does not presuppose *a link of exertion* between such market power and an abuse. The AG did not presuppose that either.[496] The ECJ saw dominance as a negative—albeit non-prosecutable—status that facilitates the carrying-out of an abuse. By using the rhetoric of "recourse to methods different from those which condition normal competition", it implied certain intrinsic deviance or wrongfulness of an abuse, but it provided no indication as where that wrongfulness lies. The attempt of resorting to "effect" at the end of this statement did not help explain where that intrinsic wrongfulness lies either. The only thing clear from this statement is the accentuated concern for the preservation of a competitive market structure.

The ECJ's harm analysis of the second kind of contracts referred only to the possibly anticompetitive mechanism of the rebates in question: the ECJ distinguished loyalty rebates from quantity rebates, as loyalty rebates are individualized, non-volume-based, and aimed at attaining the maximum portion (as opposed to quantity) of a customer's requirements.[497] There was no examination of the actual or potential effects of those rebates.

The ECJ used a separate section of the judgment to examine the English clause, and eventually reached the conclusion that this clause did not alleviate the restrictive effects of the abovementioned contracts,[498] and instead served as a way for Roche to extract competition-related information, thereby aggravating the abuses of dominance.[499] This examination was structure-oriented and form-based. First, its starting point was how the *purchasers* were being restricted, without any discussion on the restriction of competition borne by Roche's competitors. Arguably, this was inconsistent with the ECJ's prioritization of competition-related types of harm as mentioned earlier. Secondly, this examination focused on the negative side of the English clause: the ECJ quickly dismissed Roche's defense arguments in this section, simply on the grounds that Roche was able to largely control the level of competition, without actually looking at to what extent this English clause had effected competition in the case circumstances.

495 The ECJ judgment on *Hoffmann-La Roche*, para 91.
496 The AG opinion on *Hoffmann-La Roche*, 583.
497 The ECJ judgment on *Hoffmann-La Roche*, para 100.
498 Ibid., para 104.
499 Ibid., para 107.

The structural and form-based harm analysis was also shown in the ECJ's examination of the third kind of contracts. The examination stayed mostly at a theoretical level. For example, the ECJ discussed only the anticompetitive *incentive* and *purpose*,[500] or potentially anticompetitive *mechanisms* of the contracts,[501] while refraining from ascertaining whether and to what extent these incentives and mechanisms had effectuated in reality. In fact, the ECJ seems to have deliberately excluded considerations of factors that might alleviate the supposedly anticompetitive effects of the practices in question, and the ground of that exclusion was once again the structural view that competition has already been weakened because of the presence of the dominant undertaking.[502] A closer look at the ECJ's examination of the "Union effect" dimension would reveal that the ECJ's determination in relying on this structural approach to anticompetitive assessment stemmed from the concern for market integration.[503]

2.12.3 Michelin I

2.12.3.1 The Commission's Theory of Harm

The Existence of Abuse as an Indicator of Dominance

The Commission defined the relevant market as "the market in new replacement tyres for trucks, buses and similar vehicles" in the Netherlands.[504] It found Michelin dominant in that market after considering several factual aspects, including market share, the strength of commercial network and technical support, and the wide range of production.

One special aspect of the dominance assessment pertained to the fact that Michelin carried out the alleged abuse. As the Commission stated, "As is often the case in situations such as that being examined here, the finding of a dominant position is supported *inter alia* by the evidence relating to the abuse of that position".[505] The Commission's reasoning was that the dominant position enabled Michelin to carry out certain conduct (such as the one in question) that it would not have been able to carry out had there been effective competition.

In that event, a question arises as to whether this amounted to a circular reasoning. Supposedly, dominance should be established before the finding of an abuse, because the two-tier analytical paradigm under Art 102 TFEU requires that only *abusive* conduct by dominant undertakings is prosecutable. Without the prerequisite finding of dominance, theoretically such abusive conduct would have no difference from normal competitive

500 Ibid., paras 111, 120.

501 Ibid., para 115.

502 Ibid., para 120.

503 Ibid., para 125.

504 81/969/EEC: Commission Decision of 7 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV.29.491 - Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin), [December 9, 1981] OJ L 353, paras 31, 34 (hereinafter, "the Commission decision on *Michelin I*").

505 Ibid., para 35.

behavior. In fact, if indeed certain conduct could only be carried out by dominant undertakings, Art 102 might as well just prohibit such conduct as such, instead of processing it under the "abuse of dominance" paradigm. It is thus questionable whether the existence of a suspected abuse could be used reversely as supplementary evidence of dominance without any precondition laid out.

A Structure-Based and Foreclosure-Centered Theory of Harm

Moving on to the abuse analysis, the Commission alleged three sets of harm:

- The restriction of freedom of choice of customers,
- The discriminatory treatment of customers, and
- The output foreclosure of competitors.[506]

The Commission's concern for the foreclosure of competition was structure-based, in the sense that it provided no substantiation on competitors being foreclosed.[507] The Commission's analysis showed that what underpinned this structure-based harm rationale was once again the concern for market integration.[508] On that basis, the Commission started the analysis by examining the possibly anticompetitive characteristics of the rebate scheme in question, as well as the accompanying reinforcing mechanisms, including the regular visits of Michelin representatives,[509] and the absence of written notification.[510] Using the facts established in previous parts of this decision, the Commission demonstrated how this rebate system had indeed functioned in a loyalty-inducing manner[511] and to the end of constraining dealers and consequently foreclosing competition.[512]

Subsequently, the Commission examined the harm of discrimination. Referring to Art 86(c) of the EEC Treaty, it found the rebate scheme in question resulted in varying discounts that "do not in any way correspond to services that, from an economic point of view, are objectively provided and ascertainable".[513] In other words, "comparable amounts of purchased almost never result in the same or comparable discounts".[514] In a way, it could be said that the Commission's analysis of the harm of discrimination is quite superficial, in the sense that it stopped at the assessment stage of discriminatory treatment, without further assessing whether certain customers were indeed being put in a competitive disadvantage in their market by this particular discrimination.

506 Ibid., para 37.
507 Ibid., para 49.
508 Ibid., para 51.
509 Ibid., para 38.
510 Ibid., paras 46–47.
511 Ibid., para 44.
512 Ibid., paras 39–40.
513 Ibid., para 41.
514 Ibid., para 42.

Lastly, the Commission considered the extra bonus for light and tires to have constituted another abuse, by employing the tying rationale. As it stated, "In imposing this link between the two sorts of tyres, NBIM made use of its dominant position on one market with the sole aim of strengthening still further its already considerable position on another market".[515]

2.12.3.2 The AG Opinion

A Structural and Presumptive Conception of the Foreclosure Harm

The AG started the harm analysis by highlighting the individualization and the discriminatory feature of the rebate scheme in question.[516] Next, he introduced the concept of "suction effect", so as to explain how the abovementioned two features had enabled the rebate scheme to foreclose competition.[517]

Notably, by focusing on the structure and functioning of the rebates in question, the AG's anticompetitive assessment stayed largely at a theoretical level. This was exemplified by the reference to the *opportunity* "for Michelin NV to free itself from the competition", and the *assumption* that "the uncertainty about the legal consequences of not attaining at least the lowest sales targets causes them to have a greater effect on dealers' efforts than Michelin NV claims".[518] In fact, by citing the ECJ's structural approach to harm analysis in *Hoffmann-La Roche*, the AG expressly dismissed the need to verify the alleged anticompetitive effects in actual case circumstances.[519]

The AG considered separately the Commission's finding of discrimination within the meaning of Art 86(c) of the EEC Treaty. He pointed out that what distinguished Art 86(c) from other enumerated abuses was the secondary-line competition restriction, which the Commission failed to prove.[520]

2.12.3.3 The ECJ Judgment

A Structure-Based "All Circumstances" Analytical Framework on Loyalty Rebates

Regarding the abuse analysis, the ECJ started by describing and scrutinizing the features and the functioning structure of the rebate scheme in question,[521] just as the AG had done.

515 Ibid., para 50.

516 Opinion of Mr Advocate General VerLoren van Themaat (delivered on June 21, 1983) in Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, 3542 (hereinafter, "the AG opinion on *Michelin I*").

517 Ibid.

518 Ibid., 3543.

519 Ibid.

520 Ibid.

521 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, paras 66–67 (hereinafter, "the ECJ judgment on *Michelin I*").

In that regard, it referred back to *Suiker Unie* and *Hoffmann-La Roche*, to distinguish "loyalty rebates" from "quantity rebates" and "rebates attached with exclusivity obligations".[522]

On that basis, the ECJ established an analytical framework for assessing the kind of loyalty rebates in this case:

> [I]t is therefore necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[523]

Three sets of harm were enunciated here:

- The limitation of freedom of choice,
- The foreclosure of competition, and
- The discriminatory treatment of customers.

In light of the three sets of harm, the ECJ summarized the Commission's accusations against Michelin into two: (1) binding dealers to itself, and (2) applying dissimilar conditions to equivalent transactions.[524] The first accusation covered the first two sets of harm, and the second accusation covered the third one.

Regarding the first accusation, the ECJ examined the aim, structure, and functioning mechanisms of the rebate scheme in question, as one aspect of the analytical framework it established, namely the assessment of "the criteria and rules for the grant of the discount".[525] It also took a broader account of the circumstances of the dominated market in which the rebate scheme was implemented.[526] Eventually, it concluded that the rebate scheme indeed limited "the dealers' choice of supplier", made "access to the market more difficult for competitors", and was not "based on any countervailing advantage which may be economically justified".[527]

Notably, despite establishing the "all circumstances" analytical framework, the ECJ limited the anticompetitive analysis at a theoretical level. This could be attributed to the structural

522 Ibid., paras 71–72.
523 Ibid., para 73.
524 Ibid., para 74.
525 Ibid., paras 76–81.
526 Ibid., para 82.
527 Ibid., para 85.

focus it adopted at the beginning of the examination. As the ECJ stated, "Article 86 covers practices which are likely to affect the structure of a market".[528]

Regarding the second accusation, the ECJ annulled the Commission's finding of discrimination within the meaning of Art 86(c), mainly on the ground that the Commission failed to prove "such differences in treatment between different dealers are due to the application of unequal criteria".[529]

It also annulled the Commission's finding of abuse on the extra bonus in 1977, based on the observation that such bonus was actually discount on sales of car tires, without any tying obligation attached.[530]

2.12.4 Michelin II

This case concerned the rebate policy implemented by Michelin from 1980 until 1998. This rebate policy had three components: (1) the general price conditions for French dealers, (2) PRO agreement, and (3) the Michelin Friends Club program.[531] Two relevant markets were defined, including the French market in replacement tires for trucks and buses, and the French market in retreads for trucks and buses.[532]

The Commission found dominance of Michelin in both markets. Its finding of dominance relied primarily on Michelin's holding of "very large market shares"—namely shares above 50%, which were in themselves evidence of dominance pursuant to *Hoffmann-La Roche* and *AKZO*.[533] It also looked at the various aspects of structural advantages enjoyed by Michelin comparing to its competitors.[534] Moreover, it considered the suspected practice as an indicator of dominance, based on the reference to *United Brands*.[535] Lastly, it looked at Michelin's customer relations, and found the fact that Michelin was an unavoidable trading partner to its customers was a further indication of dominance.[536]

528 Ibid., para 70.

529 Ibid., para 90.

530 Ibid., paras 95–98.

531 2002/405/EC: Commission Decision of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin), [May 31, 2002] OJ L 143, para 50 (hereinafter, "the Commission decision on *Michelin II*").

532 Ibid., paras 170–71.

533 Ibid., paras 174, 176, 180.

534 Ibid., paras 181–96.

535 Ibid., paras 197–99.

536 Ibid., para 202.

2.12.4.1 The Commission's Theory of Harm

The Element of Anticompetitive Purpose

Before examining respectively the abusiveness of the three rebate components, the Commission made some general statements regarding its intended approach of examination. First, it referred to *Hoffmann-La Roche* for the classic objective definition of abuse.[537] Next, by citing *United Brands*, it attempted to strike a balance between honoring the right to compete and prohibiting an abuse of dominance, based on the parameter of the "actual purpose" behind a practice.[538] In accordance with these two precedents, it made the general characterization that the rebate schemes in question were "not based on the methods which condition normal competition",[539] and that they had the main objective of foreclosing competition.[540] This suggested a purpose-oriented approach of examination, which advanced the *anticompetitive intention* of the dominant undertaking to the center stage.

Three Sets of Harm of "Quantity Rebates"[541]

The Commission assessed the so-called "quantity rebates", along with the supplementary "service bonus", "progress bonus", and "commercial agreements". It alleged three sets of harm:

- *Unfairness*, in the sense that they resulted in uneven relationships between Michelin and its French dealers,[542]
- *The foreclosure of competition*, supplemented by the harm of *freedom of choice restriction* resulted from the "loyalty-inducing effects" of the rebates in question,[543] and
- *The impediment to market integration*, along with the additional harm of *discrimination* resulted from the "market-partitioning effect" of the rebates in question.[544]

According to the Commission, the harm of unfairness was shown in four aspects on the part of Michelin's customers: the uncertainty created by the rebate schemes, the burden to resell at loss before being rebated, the weakened negotiation position for further purchases, and the sacrifice of cash flow because of the gap between a sale and getting rebated.[545] The harm

537 Ibid., para 209.

538 Ibid., para 211.

539 Ibid., para 212.

540 Ibid., para 213.

541 It should be noted that the "quantity rebates" addressed in this decision do not have the same meaning as the expression of "quantity rebates" developed in later case law, as the latter specifically refers to rebates based purely on volumes of purchase, whereas the former were based on the total turnover within a certain period, as described by the Commission in paragraph 216.

542 The Commission decision on *Michelin II*, para 218.

543 Ibid., para 226.

544 Ibid., para 240.

545 Ibid., paras 219–24.

of unfairness was also present in the service bonus program, where the granting of bonus was based on a large margin of discretion, therefore enabling Michelin to exert pressure on the dealers unilaterally and discriminatorily.[546] It was also present in the progress bonus program, in the sense that the individualization of that program amounted to a unilateral requirement to increase purchases and entailed uncertainty and discrimination.[547]

Regarding the harm of competition foreclosure, the Commission adopted a presumptive view on how this harm came about. Setting the analytical focus on the functioning structure of the rebate schemes, it introduced the concept of "loyalty-inducing effects": the design of the rebate schemes (namely the long reference period) created an uncertainty on the buyers, thereby restricting their freedom to choose supply sources and incentivizing them to purchase only from Michelin.[548] Additionally, the Commission considered such uncertainty to be unfair as well.[549] The harm of competition foreclosure was also present in the service bonus program and the progress bonus program, in the sense that the design of these programs made the dealers more dependent on the Michelin's supply, at the expense of Michelin's competitors being excluded.[550]

Regarding the harm of impeding market integration, the Commission claimed that the rebates in question limited both imports and exports of the French dealers, thereby isolating the French market.[551] Also, it considered such limitation to be discriminatory.[552]

After assessing these rebate schemes separately, the Commission attempted to assess their combined abusive effects. However, nothing new was added to the analysis. The Commission basically restated the harm of unfairness, as it referred to the imposition of exclusivity requirements, the large margin of subjectivity, and the resulted uncertainty.[553] Therefore, one could said that the Commission took a shortcut to the anticompetitive assessment, in the sense that it elaborated the abusiveness mostly as "unfairness", instead of making an effort to link the aggravated abusiveness with "the harm to competition". This issue was also present in the Commission's assessment of "the new system" introduced in 1997: the harm underlying the frequented referred "loyalty-inducing effect" was supposed to be competition foreclosure, but most of the time the Commission was looking at the supplier-buyer relationship, and not discussing how the competitive relationship between Michelin and its competitors was being impeded.[554]

546 Ibid., paras 250–53.
547 Ibid., paras 263–66.
548 Ibid., paras 227–30, 239.
549 Ibid., para 239.
550 Ibid., paras 254–58, 267–69.
551 Ibid., paras 242, 245–46.
552 Ibid., para 245.
553 Ibid., paras 275–79.
554 Ibid., paras 294–95.

The PRO Agreement and the "Michelin Friends Club": Competition Foreclosure as the Central Concern

The Commission alleged two sets of harm of the PRO agreement: *foreclosing competition* and *isolating the French market*. According to the Commission, the harm of competition foreclosure came from the two-way leveraging of market power,[555] as the result of (1) the exclusive dealing requirement concerning retreads,[556] and (2) tying the retreading business with the new-tire purchase.[557] Because of this exclusive dealing requirement, competing undertakings in the retread market were being starved of input: an increasing number of carcasses, which were the initial material for retreading, were being supplied to Michelin under that exclusive dealing incentive program.[558] Meanwhile, the tying practice constituted directly an abuse within the meaning of second paragraph (b) of Art 82 of the EC Treaty.[559] Regarding the harm of isolating the French market, the Commission resorted to the notion of special responsibility, claiming that a dominant undertaking "has a responsibility to ensure that it does not create a system that partitions national markets".[560]

The Commission identified the core harm of the Michelin Friends Club to be *the foreclosure of competition*, as the Club imposed an obligation "to ensure that a certain proportion of one's sales was composed of Michelin products".[561] The Commission's view on this harm was essentially structural and form-based, in the sense that it *presumed* this Club program would entail anticompetitive effects.[562] More specifically, it stated that "an obligation of this kind must necessarily be considered abusive, as it is aimed directly at eliminating competition on the part of other manufacturers, guaranteeing the maintenance of Michelin's position, and limiting competition on the market".[563] Besides this core harm, it seems that there was also a supplementary concern for *the limitation of freedom of choice*, as the Commission observed that, because of the stock-percentage requirement, the dealers were not able to stock "in a volume that matches their own wishes".[564]

2.12.4.2 The CFI Judgment

Confirming Competition Foreclosure as the Core Harm

The CFI fully endorsed the Commission decision, and confirmed the foreclosure of competition as the core harm. For example, by referring to a string of precedents, it distilled a benchmark for assessing the legality of a rebate scheme: whether it *tends to*

555 Ibid., para 298.
556 Ibid., para 301.
557 Ibid., para 304.
558 Ibid., para 301.
559 Ibid., para 310.
560 Ibid., para 314.
561 Ibid., para 315.
562 Ibid., paras 330–31.
563 Ibid., para 317.
564 Ibid., para 321.

"prevent customers from obtaining their supplies from competitors".[565] It also summarized in paragraph 110 that the illegality of the "quantity rebate" scheme in question derived from the loyalty-inducing nature, which was not economically justified, "limited the dealers' choice of supplier", and "made access to the market more difficult for competitors".[566] It stated expressly in paragraph 237 that "in the light of the context of Article 82 EC, conduct will be regarded as abusive only if it restricts competition".[567] In paragraphs 209 and 210, it clarified more specifically its understanding of this harm: *the rigidifying of the dominant position*.[568] In that sense, the CFI approved a structural conception of this foreclosure harm, and thereby excused itself from carrying out a more thorough effects-examination.[569]

The CFI indicated three features that would make a rebate scheme loyalty inducing: significant variation of discount rates, long reference periods, and a calculation based on total turnover.[570] By referring to *Michelin I*, the CFI identified the "foreclosure effect" as the source of anticompetitiveness of a loyalty-inducing rebate scheme,[571] and established the general rule that the foreclosure effect is inherent in any rebate scheme by a dominant undertaking that is not volume-based.[572]

A Supplementary Concern for Fairness

The CFI also showed a supplementary concern for fairness. For example, in paragraph 66, the CFI linked the issues of unfairness and market partitioning with the issue of loyalty inducement, and on that basis it engaged in an examination of whether the rebate scheme in question was loyalty inducing.[573] In paragraph 141, it ruled that the unfairness of the rebate scheme stemmed from the unjustified margin of discretion, and therefore should constitute an abuse; the underlying concern was the uncertainty suffered by the dealers.[574] In paragraph 156, it even stated that the finding of unfairness in itself was sufficient to establish an abuse of dominance.[575]

To a certain extent, this statement was in conflict with paragraph 237, where the CFI held that a practice would be regarded as abusive only if it entailed the harm of competition foreclosure. The CFI reconciled this conflict by adopting a structural and presumptive

565 Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II 4071, para 59 (hereinafter, "the CFI judgment on *Michelin II*").

566 Ibid., para 110.

567 Ibid., para 237.

568 Ibid., paras 209–10.

569 Ibid., para 224.

570 Ibid., para 95.

571 Ibid., para 57.

572 Ibid., para 65.

573 Ibid., para 66.

574 Ibid., para 141.

575 Ibid., paras 141, 147.

perspective on how these harmful outcomes could come about: the unjustified subjectivity of the rebate schemes.[576] In other words, the CFI considered that these two sets of harm—competition foreclosure and unfairness—could be established simultaneously, whenever the granting of a rebate scheme in question was found to be arbitrary or subjective.

An Overall Presumptive Theory of Harm

The CFI adopted a generally presumptive rule of illegality on rebate schemes. Throughout the judgment, it repeatedly held that a rebate scheme would infringe Art 82 of the EC Treaty if it could not be justified on economic or objective grounds.[577] On that basis, the CFI dismissed the arguments presented by Michelin, claiming that those arguments could not justify the subjectivity of the rebate scheme in question.[578] The CFI referred to the "special responsibility" concept for a normative support for that presumptive stance.[579] More specifically, it transcribed the "special responsibility" concept to a purpose-based standard for finding abuse: as it stated, "such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it".[580]

In an effort to further elaborate and justify this presumptive stance, the CFI equated "restriction by object" with "restriction by effect",[581] based on references to a string of precedents. First, it referred to the notion of "effect" established in *Hoffmann-La Roche*, to support the ruling that "tending to restrict competition" or "capable of having that effect" would suffice for a finding of dominance abuse.[582] Secondly, it referred to *Michelin I* for the "all circumstances" analytical framework established by the ECJ for assessing abusive practices.[583] Thirdly, it referred to *Irish Sugar* and *AKZO*, to support the ruling that "establishing the anti-competitive object and the anti-competitive effect are one and the same thing".[584] Lastly, in an attempt to draw a line between respecting for an undertaking's right to compete and prohibiting anticompetitive practices, it referred to *United Brands* and suggested that the line was whether the *purpose* of a practice was to strengthen and to abuse the dominant position.[585]

The potential problem is that, by being applicable to all types of rebate schemes granted by a dominant undertaking,[586] this presumptive stance could be unduly expansive. For example, it is questionable whether the CFI and the Commission can be so sure that they

576 Ibid., paras 141, 156, 237.
577 Ibid., paras 65, 98, 137, 140, 160.
578 Ibid., para 149.
579 Ibid., paras 98–100, 217.
580 Ibid., para 55.
581 Ibid., para 74.
582 Ibid., para 239.
583 Ibid., para 240.
584 Ibid., paras 241–42.
585 Ibid., para 243.
586 Ibid., para 100.

know everything they need to know about the pro-competitive and anticompetitive outcomes of rebate schemes that are not *prima facie* justifiable. In that light, a key issue is how to balance the risks of Type I and Type II errors. In other words, the CFI needed to decide whether the Commission should be encouraged to make judgment calls or "the benefit of doubt" should be reserved until antitrust insights reach a more solid consensus. In that regard, the CFI seems to have opted for the former, thus demonstrating a clearly deferential attitude towards the Commission's margin of discretion.

2.12.5 Post Danmark II

This preliminary ruling case concerned an allegedly loyalty-inducing rebate scheme implemented by Post Danmark in 2007 and 2008.[587] The relevant market was the Danish market of bulk mail delivery, where Post Danmark was found dominant because of its statutory monopoly on the distribution of certain mails.[588]

The Danish Competition Council (Konkurrencerådet) decided that the rebate scheme in question was abusive, after examining the structure of the rebates[589] and the relevant market circumstances.[590] The Danish Competition Appeals Tribunal (Konkurrenceankenaevnet) upheld that decision.[591] Post Danmark appealed to the Maritime and Commercial Court (Sø- og Handelsretten), which made the preliminary reference to the ECJ.[592]

Following the AG Opinion,[593] the ECJ restructured the submitted issues into three questions: (1) Under the premise that exclusionary effects are required for finding a rebate scheme abusive, exactly what circumstances should be considered when assessing such effects? (2) How relevant is the as-efficient-competitor test in that assessment? (3) Whether there is a level of "probability" and a threshold of "appreciability" of such effects?

2.12.5.1 The ECJ Ruling

The "All Circumstances" Analytical Framework

Referring to *Michelin I* and *British Airways*, the ECJ reiterated the structural conception of the foreclosure harm.[594] Accordingly, it observed that the rebate scheme in question did

587 Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 13 (hereinafter, "the ECJ ruling on *Post Danmark II*").

588 Ibid., paras 4–6.

589 Ibid., paras 7–9, 16.

590 Ibid., paras 14–15.

591 Ibid., para 18.

592 Ibid., paras 19–20.

593 Opinion of Advocate General Kokott (delivered on May 21, 2015) in Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, paras 18, 21 (hereinafter, "the AG opinion on *Post Danmark II*").

594 The ECJ ruling on *Post Danmark II*, para 26.

not qualify as a simple quantity rebate, nor did it contain exclusive trading obligations.[595] Therefore, the ECJ's answer to the first question was that "it is necessary to consider all the circumstances", particularly (1) the structure of the rebate scheme and (2) the market characteristics.[596]

When looking at the rebate scheme in question, the ECJ pointed out two features: the standardization and the retroactiveness.[597] Regarding the retroactiveness, it agreed with the AG and held that, by being retroactive with a long reference period, the rebate scheme had a disproportionate suction effect on customers.[598] Consequently, the customers were incentivized to obtain all or a substantial proportion of their supplies from Post Danmark.[599] Regarding the feature of standardization, the ECJ referred to *Michelin I* and noted that being standardized does not preclude the possibility of a rebate scheme being exclusionary.[600]

When considering the market situation, the ECJ highlighted the fact that a very large market share (95%) made Post Danmark an unavoidable trading partner, along with the fact that the market was characterized by high barriers, economies of scale, and Post Danmark's statutory monopoly.[601]

The ECJ also considered the wide customer-coverage of the rebate scheme in question. Pursuant to *Suiker Unie*, it held that the width of the coverage is relevant only to the extent of assessing the quantitative level of exclusionary effects.[602]

The Irrelevance of the As-Efficient-Competitor Test (for the Type of Rebates in Question)

Regarding the second question, the ECJ agreed with the AG and ruled that the as-efficient-competitor test ("AEC test") is not required in the assessment.[603] The main reason for this ruling was the ECJ's (and the AG's) conceptual association of the AEC test with predatory pricing cases, which were deemed different from rebate cases. This association was drawn from the case law.[604] Although the ECJ did not forbid the application of the AEC test to rebate cases,[605] it suggested that the "all circumstances" assessment is what matters the most.[606]

595 Ibid., paras 27–28.
596 Ibid., paras 29–30.
597 Ibid., paras 22–25.
598 Ibid., paras 32–35.
599 Ibid., para 36.
600 Ibid., paras 37–38.
601 Ibid., paras 39–41.
602 Ibid., paras 43–46.
603 Ibid., para 62.
604 Ibid., paras 55–57.
605 Ibid., para 58.
606 Ibid., para 59.

The ECJ's ruling on the irrelevance of the AEC test raised a few questions in an economic context. First, its automatic association of the AEC test and predatory pricing was debatable, as that association was only based on past case law instead of substantive economic analyses. Secondly, it failed to see the potential usefulness of a calibrated AEC test.[607] For example, it dismissed the AEC test by stating that a dominated market could make the emergence of an as-efficient competitor practically impossible.[608] Accordingly, it reasoned that a less efficient competitor could just be as valuable as an as-efficient one in terms of exerting constraints.[609] However, with that line of reasoning, it overlooked the possibility that, by relaxing the AEC benchmark, the AEC test could still be employed for assessing the situation where a less efficient but constraining competitor is being excluded. In fact, the ECJ's own reasoning in later paragraphs suggested that there could be more roles for the AEC test, provided that this test was neutralized from the predatory pricing jurisprudence.[610]

The Likelihood and the Appreciability of the Effects

There were two issues in the third question: the likelihood and the appreciability of the exclusionary effects. Regarding the first issue, the ECJ agreed with AG that the effects must not be purely hypothetical, but at the same time it does not have to be concrete.[611]

Regarding the second issue, the ECJ dismissed the need of establishing a threshold of exclusionary effects for a practice to be abusive. It argued that, under a structural conception of the foreclosure harm and the concept of "special responsibility", the prerequisite finding of dominance functions already as a threshold of effects.[612] Therefore, there is no need for further qualification for the purpose of finding abuse.

2.12.6 Intel

This case concerned the rebate schemes implemented by Intel. The Commission decided in 2009 that Intel's rebate schemes constituted abuses of dominance. Intel appealed to the GC, which issued the judgment in 2014. It upheld the Commission's finding of abuse, but provided an alternative version of reasoning, in the sense that it distinguished three categories of rebates and assigned to them vastly different analytical routes. Intel appealed further to the ECJ, which issued a judgment in 2017. The ECJ referred the case back to the GC for a retrial.

607 Arguably, such a calibration could be done by linking the AEC with the exclusive dealing rationale through the notion of "minimum efficient scale". See Xingyu Yan, "Whither Antitrust Regulation of Loyalty Rebates in China: The Tetra Pak Decision and Lessons from the EU," *World Competition* 40, no. 4 (2017): 620, 635.

608 The ECJ ruling on *Post Danmark II*, para 59.

609 Ibid., para 60.

610 For example, when addressing the likeliness of the exclusionary effects, the ECJ resorted to the "as-efficient competitors" logic to set the benchmark. See ibid., para 65.

611 Ibid., paras 64–66.

612 Ibid., paras 70–72.

2.12.6.1 The Commission's Theory of Harm

The Commission defined the relevant market as the worldwide market for x86 CPUs for all computers.[613] It found Intel to be dominant in that market, with AMD being its only competitor.[614] It identified two types of questionable conduct:

(1) "Conditional rebates", namely rebates conditioned on four original equipment manufacturers ("OEMs") purchasing all or almost all of their x86 CPUs from Intel;[615]

(2) "Naked restrictions", namely payments conditioned on three OEMs postponing or cancelling the launch of AMD CPU-based products and limiting the distribution channels of those products.[616]

The Commission considered these two types of conduct to be complementary to each other and comprising a single strategy to foreclosure AMD from the relevant market.[617]

The Core Harm of Competition Foreclosure

As shown in the Commission's assessment, the core harm of these two abuses was unquestionably *the output-foreclosure of competition*. Additionally, the Commission mentioned the harm of *restricting the customers' freedom to choose*,[618] and explained that the foreclosure harm leads to the further concerns of consumer choice limitation and innovation inhibition.[619]

Regarding the first abuse, the Commission adopted a form-based approach to demonstrate the core harm of competition foreclosure: It found that the rebates in question were *de facto* conditional upon the customers purchasing all or most of their x86 CPU requirements from Intel.[620] Based on that finding, the Commission characterized those rebates as "fidelity discounts" in accordance with the case law, and stated that such rebates should be *per se* abusive.[621]

Regarding the second abuse, the Commission found that there was a customer demand for AMD-based products, and that Intel's conditional payments to the OEMs were directly

613 Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel), paras 835–36 (hereinafter, "the Commission decision on *Intel*"). The Commission left open the question whether the product market could be further divided into three segments (desktops, laptops, and servers), as it considered that such a division would make no difference in the finding of dominance.

614 Ibid., para 912.

615 The Commission also identified a conditional payment made by Intel to MSH the retailer, which was conditional on MSH selling exclusively Intel-based PCs. It considered this conditional payment to have the equivalent effect of these conditional rebates. See ibid., para 1000.

616 Ibid., paras 924–25, 1641.

617 Ibid., para 1642.

618 Ibid., paras 924, 1001.

619 Ibid., para 1616.

620 Ibid., paras 924, 1001.

621 Ibid., paras 920, 925.

responsible for such a demand not being met. In that light, the Commission stated that customer choice was limited and competition on the merits was inhibited.[622] It stated that those payments constituted "recourse to methods different from those governing normal competition" and thus were abuses of dominance.[623]

The As-Efficient-Competitor Analysis as an Alternative

Although insisting that the rebates in question were *per se* abusive, the Commission still spent a major part of the decision to enage in an as-efficient-competitor analysis. The intention was to demonstrate that, even in the alternative scenario where the *per se* abusive rule were not to stand, the rebates in question would still constitute an abuse for generating the anticompetitive effect of excluding as-efficient competitors.[624] This as-efficient-competitor analysis became a main point of contention in subsequent appeals to the GC and the ECJ.

2.12.6.2 The (Referred-back) GC Judgment

The Foreclosure Harm Inherent in the Exclusivity of the Rebates and the Entailed Per Se Rule of Abusiveness

Following the settled case law, the GC categorized rebates into three kinds and assigned to them vastly different analytical routes:

- *Quantity rebates*, which are linked solely to the volume of purchases and are considered generally benign;[625]
- *Exclusivity rebates*, which are "conditional on the customer's obtaining all or most of its requiremnts" from the dominant undertaking.[626] The GC considered this type of rebates to be *per se* abusive, pursuant to the ECJ ruling in *Hoffmann-La Roche*.[627] It stated that the rebates granted by Intel fell within this category.[628]
- *Rebates falling within the third category*. This type of rebates "is not directly linked to a condition of exclusive or quasi-exclusive supply", but the mechanism for granting such rebates may have a fidelity-building effect. The GC stated that this type of rebates should be put into the "all circumstances" analytical framework, so as to verify whether it has the required anticompetitive effect and thus should be declared abusive.[629]

622 Ibid., para 1679.

623 Ibid., para 1681.

624 Ibid., paras 1574–76.

625 Case T-286/09 *Intel Corp. v European Commission*, ECLI:EU:T:2014:547, para 75 (hereinafter, "the referred-back GC judgment on *Intel*").

626 Ibid., para 76.

627 Ibid., paras 80–81.

628 Ibid., para 79.

629 Ibid., paras 78, 84.

The GC's ground for declaring exclusivity rebates to be *per se* abusive was that they are "by their very nature capable of restricting competition".[630] In other words, the GC considered that the anticompetitive effect is *inherent* in the very existence of an exclusivity rebate scheme.

The GC elaborated this inherent anticompetitiveness as follows. For a start, the finding of dominance indicates that the undertaking is, to a large extent, "an unavoidable trading partner".[631] This means that the dominant undertaking has a "non-contestable share" of the relevant market, for which the competitors are not able to compete; instead, the competitors are only able to compete for the contestable share of the market.[632] Under that premise, the GC explained how the "exclusivity" design would enable the rebate schemes to function anticompetitively: by creating a financial incentive and a threat (to stop supplying the non-contestable share of demand) for the customers to stop trading with the competitors, the dominant undertaking would be able to leverage its market power from the non-contestable share of market to the contestable share, thus effectively output-foreclosing its competitors.[633]

Subsequently, the GC considered this exclusivity mechanism to be *per se* abusve, based on a structural conception of the foreclosure harm. First, it considered that "a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult".[634] In line with that logic, it accentuated the concept of "special responsibility".[635] The idea was that a dominant position is already a compromise of the competitive structure of a market; any "additional interference" by the dominant undertaking with the market structure would constitute an abuse.[636] The GC considered that the exclusivity rebates constitute clearly an "additional interference", and thus should be declared abusive.[637]

By linking the *per se* abusiveness of the rebates with the exclusivity element, the GC dismissed the need to consider elements that are not associated with the exclusivity of the rebates. For example, it held that there is no need to consider "the level of the rebates", because even a rebate of a minum amount is still able to undermine the competitors;[638] nor there is a need to consider the extent of foreclosure, because it is not for the dominant undertaking

630 Ibid., para 85.
631 Ibid., para 91.
632 Ibid., para 92.
633 Ibid., paras 92–93.
634 Ibid., para 88.
635 Ibid., para 90.
636 Ibid., paras 90, 139.
637 Ibid., para 111.
638 Ibid., paras 108–09.

to dictate what degree of comopetition should exist in the market.[639] Most importantly, the GC dismissed the need to consider "all circumstances of the case", or put differently, the need to prove any actual or potential foreclosure effect. The grounds were that the elment of exclusivity makes the rebates essentially different from the other categories of abusive pricing practices,[640] and that, according to established case law pertaining to rebate cases, the "all circumstances" analytical framework was never extended to exclusivity rebates.[641]

The Relevance of the AEC Test

One question can be raised regarding the *per se* abusive rule on exclusivity rebates: while this rule conforms with the structural conception of the foreclosure harm and particularly the "special responsibility" concept, does it also need to reconcile with the notion of "competition on the merits", which suggests the rationale that a dominant undertaking should be encouraged to adopt competitive measures that might drive out *less efficient* competitors? In other words, it is discussable whether the structural conception of the foreclosure harm should be qualified with an "as-efficient-competitor" threshold. According to this threshold, an exclusivity rebate scheme would be deemed *per se* abusive only if it were to foreclose as-efficient competitors (instead of just any competitor).

This is where the relevance of the AEC test enters the discussion. The Commission addressed this issue in an alternative scenario where it exempted itself from the legal obligation to perform that test. The GC denied the applicability of the AEC test to exclusivity rebates, for the same reason it dismissed the need to consider "all case circumstances": the exclusivity element.[642] In that regard, the GC reiterated the structural conception of the foreclosure harm, which "occurs not only where access to the market is made impossible for competitors" but also where "it has been made more difficult".[643] The GC even denied the applicability of the AEC test to the third category of rebates it established, by referring to *Michelin I* and *Tomra*.[644]

Nonetheless, the GC's grounds for denying the AEC test did not address the question of how the *per se* abusive rule on exclusivity rebates should reconcile with the notion of "competition on the merits". Hypothetically, one could argue that the exclusivity rebates are not a form of merits-based competition, but that would require the demonstration that an exclusivity rebate scheme would—in all circumstances—entail anticompetitive effects (after counterbalancing with its potential pro-competitive effects). The GC did not engage in such a discussion.

639 Ibid., paras 117, 124.
640 Ibid., paras 99, 103–04.
641 Ibid., para 97.
642 Ibid., para 143.
643 Ibid., paras 149–50.
644 Ibid., paras 144–46.

The ECJ set aside the GC's judgment, precisely because the GC failed to examine the Commission's application of the AEC test. According to the ECJ, this test, despite being declared as unnecessary, *de facto* "played an important role in the Commission's assessment", and therefore must be substantively reviewed in the appeal against the Commission deicison.[645] It remains to be seen how the GC would address this issue in the retrial.

3 Interim Conclusions

3.1 A "Division of Labor" between the Commission and the CJEU

3.1.1 The Allegation of Harm

In all the annulment cases as collected above, the Commission consistently took the initiative to allege the types of harm at stake. It was only in rare occasions that there was no traceable allegations of harm from the Commission. Such was the case in *United Brands* (concerning the practice of excessive pricing). There, in the event of no obvious harm identified by the Commission, the ECJ in the appeal judgment advanced "monopoly exploitation" as the underlying harm of the excessive pricing practices.

In most cases, the CJEU deferred to the Commission's allegations of harm. It did so in the process of constructing its theories of harm, and in ways that rephrased and prioritized certain types of harm advanced by the Commission. It was only on rare occasions that the CJEU disapproved the Commission's allegations of harm. One example is *Commercial Solvents*, where the ECJ implicitly disregarded the idea of discrimination as a source of harm.

In some cases, the Commission's decisions were annulled in subsequent appeals, but its allegations of harm were not questioned. One example is *General Motors*, where the ECJ annulled the Commission's decision regarding abusive excessive pricing. The ECJ did so based on the factual finding that the excessive pricing was justified in the specific circumstances.

3.1.2 The Elaboration of Theories

While the Commission took the initiative to make the allegations of harm, the CJEU focused on elaborating and developing the theories of those alleged types of harm. This can be described from two aspects.

The first aspect is the comparison between the annulment cases and the preliminary ruling cases. Out of the twenty-three cases, seven were prelimary ruling cases. Revolving around the harm of competition foreclosure, these preliminary ruling cases showed a high level of consistency in elaboration. They are listed as follows:

645 Case C-413/14 P *Intel Corp. v European Commission*, ECLI:EU:C:2017:632, paras 143–46, 149.

- *CBEM-Telemarketing*,
- *Bronner*,
- *IMS Health*,
- *Sot Lélos*,
- *TeliaSonera,*
- *Post Danmark I*, and
- *Post Danmark II*.

The first four cases pertain to the practice of refusal to supply. It happens so that "refusal to supply" as a type of abuse has the most well established analytical framework among all the introduced types of abuses. These four cases contributed greatly to that. For example, in *CBEM-Telemarketing*, the ECJ accentuated the presumptively construed harm of competition foreclosure; subsequently, it began to elaborate the theory of harm in *Bronner* by introducing the benchmark of "exceptional circumstances"[646] and formulating the three criteria for assessing refusals to supply: excluding all competition, not being objectively justified, and the indispensability of a withheld product.[647] The ECJ took one step further in *IMS Health*. There, two criteria for testing the indispensability were formulated,[648] and the other two *Bronner* criteria were reformulated into three cumulative condictions in the context of IPRs protection: prevention of a new product, not justified, and excluding all competition.[649] After clearing the obstacles in applying those conditions, the ECJ in *Sot Lélos* was able to discuss more thoroughly the particular criterion of no objective justification.[650]

In *TeliaSonera*, the ECJ refined the jurisprudence established in *Deutsche Telekom* concerning margin squeeze, and ruled that "anticompetitive effect" is required for finding an abusive margin squeeze. In line with the logic that such "anticompetitive effect" should be construed as the exclusion of as-efficient competitors, the ECJ found many of the assessment criteria proposed by the referring court to be irrelevant, but it advance two "must consider" criteria: the indispensability of the wholesale product, and the marginal level between the wholesale prices and the retail prices.

The same is true for *Post Danmark I* and *Post Danmark II*. In the former, the ECJ broke the ground by establishing a formula that is alternative to the AKZO formula for assessing predatory pricing.[651] It also broke the ground by acknowledging the usefulness of the as-efficient-competitor rationale.[652] In *Post Danmark II* regarding loyalty rebates, the ECJ

646 The ECJ ruling on *Bronner*, paras 39–40 (note 305 above).
647 Ibid., para 41 (note 306 above).
648 The ECJ ruling on *IMS Health*, para 28 (note 313 above).
649 Ibid., para 38 (note 316 above).
650 The ECJ ruling on *Sot Lélos*, para 39 (note 364 above).
651 The ECJ ruling on *Post Danmark I*, para 39 (note 197 above).
652 Ibid., para 38 (note 196 above).

reconfirmed the "all circumstances" framework,[653] and clarified specifically issues including the legal relevance of the as-efficient-competitor test,[654] the threshold and the likeliness of the anticompetitive effects.[655]

The second aspect is the comparison of the harm analyses of the Commission and the CJEU in the annulment cases. This is discussed in the following subsections about the different types of harm. Overall, it can be said that the CJEU has the upper hand when cooperating with the Commission to produce theories of harm in individual cases. In that regard, there was no routinized deference to the Commission.

3.2 The Harm to Market Integration

One would find the harm to market integration to be the easiest to identify, by looking for the references to the Common Market and the concerns for cross-Member State trade in individual cases. This harm was expressly alleged in a number of cases. All of these cases were from the 1970s except *Michelin II*. They can be listed chronologically as the following:

- *Continental Can*,
- *Suiker Unie*,
- *General Motors*,
- *United Brands* (concerning restriction of resale, discriminatory pricing, and refusal to supply), and
- *Michelin II*.

In these cases, it was always the Commission that initially alleged the harm. The CJEU's ways of processing of those allegations can be classified into three types:

(1) Upholding the Commission's allegation, by way of referring to the Treaty provision that is now Art 102 TFEU or providing more elaborate reasoning. *Suiker Unie* (restriction of resale) was a case of the former option, whereas *Suiker Unie* (loalty rebates) and *General Motors* were examples of the latter. *United Brands* (restriction of resale and refusal to supply) was an example of both options.

(2) Upholding the Commission's allegation, and making additional allegations of harm. Such was the case in *United Brands* (discriminatory pricing).

(3) Accepting the Commission's allegation, but shifting the focus from the harm to market integration to the harm of structural competition-restriction. Such was the case in *Continental Can*.

653 The ECJ ruling on *Post Danmark II*, paras 29–30 (note 596 above).

654 Ibid., para 62 (note 603 above).

655 Ibid., paras 64–66, 70–72 (notes 611 and 612 above).

3.3 The Harm of Structural Competition Foreclosure

Competition foreclosure is another repeatedly alleged harm. In fact, it is also the most consistently developed harm conception. This is easy to understand: it is common to allege the harm of competition foreclosure in abuse of dominance cases, since the foreclosure of competition (and therefore monopolization) is indisputably linked with the very conception of "abuse of dominance". The real question is how to construe it.

In that regard, the application of the Treaty provision that is now Art 102 TFEU embraced a structure-based approach from the outset. This structure-based approach was able to easily accommodate the concern for market integration. Thus at a certain point, the delineation between the harm to integration and the foreclosure harm became very blurry. This is demonstrated by cases located throughout the enforcement history of Art 102. They can be listed as the following:

- *Continental Can*,
- *Commercial Solvents*,
- *Hoffmann-La Roche*,
- *Michelin I*,
- *CBEM-Telemarketing*,
- *AKZO*,
- *Magill*,
- *Bronner*,
- *Michelin II*,
- *IMS Health*,
- *Microsoft* (refusal to supply and tying)
- *Sot Lélos*,
- *DSD,*
- *Deutsche Telekom,*
- *TeliaSonera,*
- *AstraZeneca*,
- *Post Danmark I*,
- *Post Danmark II*, and
- *Intel.*

These cases suggest a special flow of institutional dynamics: since the real question is about how to construe the foreclosure harm (instead of merely alleging it), the CJEU took the center stage by assuming its upper-hand role in elaborating this harm, whereas the Commission took a back seat with its role in alleging this harm. This can be explained from three aspects.

First, seven out of these nineteen were preliminary ruling cases, in which the Commission played no direct part in constructing the theories of harm.

Secondly, in the early enforcement cases including *Continental Can*, *Commercial Solvents*, and *Hoffmann-La Roche*, the Commission merely implied the harm of competition foreclosure, without explaining its understanding of this harm. For example, the Commission in *Continental Can* stashed its concern for competition foreclosure underneath the allegation of user-choice restriction;[656] it was the ECJ that highlighted the foreclosure harm from a structural view.[657] In *Commercial Solvents*, the Commission expressed the concern for the maintenance of effective conditions of competition in the Common Market, which suggested both the integration harm and the foreclosure harm;[658] it was once again the ECJ that accentuated the foreclosure harm.[659] In *Hoffmann-La Roche*, the Commission's clarification of the foreclosure harm was simply the observation that the loyalty rebates induced exclusivity;[660] it was the ECJ that clarified the foreclosure harm in light of primary-line and secondary-line injuries.[661]

Thirdly, the Commission began to elaborate its understanding of the foreclosure harm in *Michelin I*.[662] However, that elaboration was just a refined reiteration of the ECJ's structural conception of the foreclosure harm elaborated in *Hoffmann-La Roche*. The same is true in *AKZO*, *Magill*, *Michelin II*, *Microsoft*, *DSD*, *Deutsche Telekom*, *AstraZeneca*, and *Intel*, in which the Commission deferentially referred to previous case law and briefly reiterated the structural conception of foreclosure harm.

3.4 Other Harm Concerns

Some of the collected twenty-three cases also showed a tendency (especially on the part of the Commission) of referring to the enumerated abuse examples in the Treaty provision that is now Art 102 TFEU.

Notably, the enumerated abuse examples in Art 102 (from second paragraph (a) to (d) of Art 102) are phrased in a rather open-ended way (especially Art 102(b)), and therefore they are not mutually exclusive in terms of the harm concerns they can accommodate. Direct references to these examples provided the Commission and the CJEU a way to find abuses without actually identifying and substantiating the types of harm at stake, as exemplified by the cases presented below. Through these direct references, more than one type of harm could be alleged, and due to the vague references, it would be difficult sometimes to ascertain exactly what kinds of harm were at stake. In that light, the following subsections

656 The Commission decision on *Continental Can*, para 38 (note 51 above).
657 The ECJ judgment on *Continental Can*, para 26 (note 69 above).
658 The Commission decision on *Commercial Solvents*, 54 (note 231 above).
659 The ECJ judgment on *Commercial Solvents*, para 25 (note 233 above).
660 The Commission decision on *Hoffmann-La Roche*, para 23 (note 471 above).
661 The ECJ judgment on *Hoffmann-La Roche*, para 80 (note 490 above).
662 The Commission decision on *Michelin I*, para 49 (note 507 above).

look at the references to Art 102(a), (b), and (c), where other types of harm were possibly alleged.

3.4.1 Concerns under Art 102(a)

One case referred to Art 102(a): *DSD*. There, the Commission alleged the harm of monopoly exploitation in the form of imposing unfair prices and trading conditions. The CFI and the ECJ fully supported this harm allegation in the subsequent appeals.

3.4.2 Concerns under Art 102(b)

Many allegations were made by references to Art 102(b), which addresses the limitation of "production, markets or technical development to the prejudice of consumers". Cases making such references include the following:

- *Continental Can*,
- *Commercial Solvents*,
- *Suiker Unie* (restriction of resale and loyalty rebates),
- *United Brands* (refusal to supply),
- *Magill*, and
- *Microsoft* (refusal to supply).

It is not entirely clear what types of harm underpin Art 102(b). This gave the CJEU the upper hand in the cooperative process (with the Commission) for producing a theory of harm, as the CJEU relied heavily on references to Art 102(b), on which it gives authoritative interpretations, to elaborate exactly what are the types of harm at stake behind this provision.

In some cases, the reference to Art 102(b) was a way to elaborate the harm of structural competition foreclosure and the supplementary harm of restriction on freedom of choice. For example, in *Continental Can*, the Commission brought up the restriction on freedom of choice with the underlying concern for competition restriction;[663] in appeal the ECJ linked the restriction of freedom to the indirect undermining of market structure by referring to Art 86(b) of the EEC Treaty.[664] In *Commercial Solvents*, the Commission alleged product limitation by implicitly quoting Art 86(b);[665] in appeal, the ECJ adjusted the Commission allegation towards structural competition foreclosure.[666]

In some other cases, the reference to Art 102(b) was associated with the harm to integration. For example, in *Suiker Unie*, while the Commission clearly considered the protection of integration but provided little reasoning, the ECJ cited Art 86(b) to back up the concern for

663 The Commission decision on *Continental Can*, 38 (note 51 above).

664 The ECJ judgment on *Continental Can*, para 26 (note 69 above).

665 The Commission decision on *Commercial Solvents*, 55 (note 232 above).

666 The ECJ judgment on *Commercial Solvents*, para 25 (note 233 above).

the Common Market.[667] In *United Brands* (refusal to supply), after the Commission brought up the concern for freedom of choice with a mere statement,[668] the ECJ furthered that concern towards market integration by referring to Art 86(b).[669]

There was also the case of *Magill*, in which the Commission quoted Art 86(b) for the literal interpretation of "product limitation" as an additional source of harm of the refusal to license in question.[670] The ECJ upheld this.

Finally, there was *Microsoft* (refusal to supply), in which the Commission's reference to Art 86(b) was underpinned by the proclaimed concern for consumer welfare.[671] The CFI fully endorsed this.

3.4.3 Concerns under Art 102(c)

References were also frequently made to Art 102(c), which prohibits abuses of "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". In that light, the alleged harm was the discrimination of customers, possibly underpinned by the further concern of downstream competition distortion. The following cases made such references:

- *Commercial Solvents*,
- *Suiker Unie* (loyalty rebates),
- *United Brands* (discriminatory pricing and refusal to supply),
- *BP*,
- *Hoffmann-La Roche*,
- *Michelin I*,
- *Michelin II*

A close look at the theories of harm in these cases would suggest once again a set of institutional dynamics where the CJEU had the upper hand: the Commission showed a habit of superficially referring to Art 102(c) to support its allegation of discrimination as a type of harm, but the CJEU tended to be cautious about validating this.

The CJEU's caution was first demonstrated in *Commercial Solvents*. There, although the Commission did not allege the harm of discrimination, the AG proposed the harm of discrimination by referring to Art 86(c) of the EEC Treaty; nonetheless, that proposition was set aside by the ECJ.[672]

667 The ECJ judgment on *Suiker Unie*, paras 398, 526 (notes 94 and 469 above).
668 The Commission decision on *United Brands*, 16–17 (note 246 above).
669 The ECJ judgment on *United Brands*, para 183 (note 247 above).
670 The Commission decision on *BPB Magill*, para 23 (note 272 above).
671 The Commission decision on *Microsoft*, para 693 (note 324 above).
672 The AG opinion on *Commercial Solvents*, 268–69 (note 240 above).

In *Suiker Unie*, the Commission began to allege the harm of discrimination without any analysis.[673] The ECJ placed that harm under Art 86(c), but only as a supplementary concern.[674]

In subsequent cases including *BP*,[675] *Hoffmann-La Roche*,[676] *Michelin I*,[677] and *Michelin II*,[678] the Commission continued invoking Art 86(c) and perceived discrimination as harmful at face value, while overlooking how such discrimination resulted in competition distortion in secondary-line markets.

The CJEU was consistently cautious. In *BP*, the Commission decision was annulled, on the ground that there was no abuse found.[679] In *Hoffmann-La Roche*, the ECJ recognized discrimination as harmful under Art 86, but downplayed it as a concern supplementary to competition foreclosure.[680] In that sense, the ECJ picked up the issue of "secondary-line competition distortion", which was overlooked by the Commission. Following that logic, the ECJ annulled the Commission's finding of discrimination under Art 86(c) in *Michelin I*.[681] In *Michelin II*, the CFI excluded the examination on discrimination altogether; instead, it advanced "unfairness" as a supplementary concern to the concern for market integration.[682]

For comparison, the next chapter analyzes a number of cases selected from the Chinese AML regime, with a focus on how the AML institutional structure and dynamics (described in Chapter 4) impacted the production of theories of harm.

673 The Commission decision on *Suiker Unie*, 39–40 (note 463 above).
674 The ECJ judgment on *Suiker Unie*, para 523 (note 467 above).
675 The Commission decision on *BP*, 9 (note 255 above).
676 The Commission decision on *Hoffmann-La Roche*, para 24 (note 474 above).
677 The Commission decision on *Michelin I*, para 41 (note 513 above).
678 The Commission decision on *Michelin II*, para 245 (note 552 above).
679 The ECJ judgment on *BP*, paras 38–42 (note 263 above).
680 The ECJ judgment on *Hoffmann-La Roche*, para 80 (note 490 above).
681 The ECJ judgment on *Michelin I*, para 90 (note 529 above).
682 The CFI judgment on *Michelin II*, paras 141, 147 (note 575 above).

THE PRODUCTION OF THEORIES OF HARM UNDER THE AML ON ABUSE OF DOMINANCE

Table of Contents

1 The Selection of Cases

As discussed in Section 4.3 of Chapter 4, since the AML has a dual-track enforcement system and the public enforcement agencies are to a great extent free from judicial supervision, the enforcement agencies and the courts are in fact "in competition" with each other in interpreting the AML.

This chapter is intended to discuss how the "competition" between the AML agencies and courts impacted their production of theories of harm. For that purpose, it selects a number of cases from both the public enforcement track and the private enforcement track in the tripartite era, and critically describes the allegations of harm and the elaboration of theories in those cases, with a focus on their internal consistency of logic and the degree to which they make economic sense (as discussed in Section 2.4.1 of Chapter 2).

The case selection was based on three criteria:

(1) The enforcement decision or judgment of a case is officially disclosed or at least publicly accessible online;
(2) The enforcement decision or judgment of a case needs to have an extent of legal reasoning that can host a discussion on its theory of harm. Accordingly, enforcement decisions that suspend or terminate case investigations are excluded. Court judgments that close cases on procedural grounds are also excluded;
(3) The substantive scope is limited to abuse of dominance (and additionally, resale price maintenance);
(4) The time period is limited to the tripartite era where the three central agencies share the AML public enforcement responsibilities.

As a result, thirty-two cases are selected. They consist of eight court-ruled cases (seven from the private enforcement track, and one case of judicial supervision on public enforcement), and twenty-four administratively decided cases (cases from the public enforcement track). Among the second case category, there are three NDRC cases and twenty-one SAIC cases.

In Section 2 of this chapter, these selected cases are broken down and introduced according to the types of abusive conduct that they contain. The classification of the contained abuses is based on two criteria:

(1) First and foremost, the correlation of the characterization of an abuse in question by a case-handling authority and Art 17 of the AML, which enumerates several types of abuses that ought to be prohibited.[1]
(2) Additionally, a consideration on the corresponding abuse-categorization in EU

1 Art 17 of the AML enumerates several types of abuses of dominance that are to be prohibited. Pursuant to this provision, normally a case-handling authority would characterize a conduct in question (by trying to fit it into the profile of one of those enumerations), before engaging in an abusiveness examination.

competition law. This is because the enumerations in Art 17 are neither exhaustive nor mutually exclusive. In that light, references to EU competition law, the regime that originally created the "abuse of dominance" paradigm, could be helpful.

In some cases, the central issues concern market definition and dominance finding instead of, or in addition to, abuse. These cases are introduced in Section 2.1.

Cases on resale price maintenance are also included, as an extension of the discussion on the abuse of dominance cases. This is because these two types of cases have many issues in common regarding the construction of theories of harm.

2 Theories of Harm in Abuse of Dominance and Resale Price Maintenance Cases

2.1 The Definition of Markets and the Finding of Dominance

As mentioned in Section 2.3.1 of Chapter 5, the "abuse of dominance" paradigm suggests two tiers of examination: the dominance tier and the abuse tier. Since the AML regime adopts this paradigm just as the EU regime does, the same logic applies to the AML regime: a finding of dominance is supposed to be prerequisite and has potentially significant implications for an abuse examination (which pertains to the theory of harm construction), despite being extrinsic to the latter. On that account, this subsection introduces three cases that provide interesting insights on the assessments of dominance under the AML.

2.1.1 Qihoo v Tencent

This is the first AML case that reached to the Supreme People's Court, and the first AML case involving online platform markets. The dispute was between Qihoo, a security software provider, and Tencent, a conglomerate company specializing in developing and offering various Internet-related products and services. Qihoo accused Tencent of abusing its dominant position in the instant messaging ("IM") software market in two ways: (1) restrictive dealing (within the meaning of first paragraph (4) of Art 17 AML), and (2) tying (within the meaning of first paragraph (5) of Art 17 AML). Qihoo filed a lawsuit in 2010 before the High Court of Guangdong Province, which delivered the first instance judgment in 2011. The High Court ruled in total favor of Tencent. Subsequently, Qihoo appealed to the Supreme Court, which delivered the final judgment in 2014, upholding the conclusion of the first instance judgment and the most part of its legal reasoning.

There was a background to this case. In 2010, after launching its own security software products based on its IM software product—"QQ", Tencent found that Qihoo was supplying a security software product ("QQ Bodyguard"), which was designed specifically for QQ and encouraged its users to block QQ plug-ins for the sake of privacy protection. Tencent

perceived Qihoo's actions as a threat to its two-sided business operation, for they jeopardized Tencent's sales of value-added services and advertisement placements on the QQ platform. Therefore, Tencent responded by changing the coding of QQ and informing all the users that QQ would not function on computers that simultaneously installed Qihoo's security software. Consequently, the users were forced to choose either Tencent's IM software or Qihoo's security software.[2] This "choose one from the two" practice was implemented only for one day, and was called off by the Ministry of Industry and Information Technology. Around the same time when Qihoo filed the AML lawsuit, Tencent countersued Qihoo for engaging in unfair competition under the Anti-Unfair Competition Law. This countersuit also reached the Supreme Court, which ruled in favor of Tencent.[3]

2.1.1.1 The Judgment of the Guangdong High Court

The Guangdong High Court's assessment focused on two matters: the definition of the relevant market and the finding of dominance.[4] After finding no dominance by Tencent in the defined market, the Guangdong High Court dismissed Qihoo's accusations of abuse, despite acknowledging the unjustifiability of Tencent's "choose one from the two" measure.[5] In that sense, the High Court did not reach the stage of theory-of-harm construction; nonetheless, it demonstrated its understanding of two-sided platform markets.

Applying the SSNIP Test to a Two-Sided Platform Market

The High Court started the examination by clarifying the methods for defining the relevant market. By citing the Guidelines on the Definition of the Relevant Markets adopted by the Anti-Monopoly Commission, it pointed out that the key to defining the product market is determining the extent of product substitutability from the two sides of demand and

2 For a brief description of this background dispute, see Adrian Emch, "Effects Analysis in Abuse of Dominance Cases in China – Is Qihoo 360 v Tencent a Game-Changer?," *Competition Law International* 12, no. 1 (2016): 15; David Evans and Vanessa Yanhua Zhang, "Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court," *Competition Policy International*, October 21, 2014, https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court/ (accessed November 14, 2018).

3 For the Supreme Court judgment on this unfair-competition suit, see the Supreme People's Court, *Qihoo v Tencent (unfair-competition suit, appeal)* (北京奇虎科技有限公司、奇智软件（北京）有限公司与腾讯科技（深圳）有限公司、深圳市腾讯计算机系统有限公司不正当竞争纠纷案二审民事判决书[2013]民三终字第5号), February 18, 2014, http://www.court.gov.cn/wenshu/xiangqing-7816.html (in Chinese) (accessed November 14, 2018).

4 It is difficult to pinpoint, for reference purposes, a particular segment of this judgment. This is because there is no officially disclosed version of this judgment online, and in the unofficial version (see the succeeding note), there is no pagination or numbering of paragraphs. In that light, this subsection directly quotes the relevant sentences when more specific references need to be made.

5 Guangdong High People's Court, *Qihoo v Tencent (first instance)* (广东省高级人民法院民事判决书[2011] 粤高法民三初字第2号), March 20, 2013, http://blog.sina.com.cn/s/blog_6ea11ff50101irqn.html (in Chinese) (accessed November 14, 2018) ("在法有明文规定的情况下，被告没有依法行使诉讼权利寻求制止不法侵害行为的途径，转而单方面采取"二选一"的行为，致使"3Q大战"范围扩大波及用户，其行为缺乏正当性。另外，被告强迫用户采取"二选一"的行为也超出了必要的限度") (hereinafter, "the Guangdong High Court judgment on *Qihoo v Tencent*").

supply.[6] Also, it noted a prominent feature of most Internet-related products: zero price charge.[7] On that basis, the High Court adopted the benchmark of "a small but significant non-transitory increase in price" ("SSNIP") to test the substitutability.[8]

However, it is questionable whether this benchmark is applicable to an Internet-platform product that entails no direct price charge. In other words, it is questionable whether "starting to charge a price on a previously free product" could still be considered "a small price increase" after all. This is because such a price change would essentially alter the whole business structure of a two-sided platform product. Also, it is questionable whether such a benchmark could take sufficient account of the network effects of platform markets.

The High Court's inadequate explanations did not help clarify this questionability. For example, it did not provide any indication on how it intended to carry out the SSNIP test. Moreover, when adopting this benchmark, the High Court ignored one crucial argument raised by the plaintiff: since IM products are normally free, the market competition lies not in price but in product quality, and therefore the substitutability test should use the benchmark of "a small but significant non-transitory decrease in quality".[9] The High Court did not provide any reason for dismissing this argument.

An Overly Broad Definition of the Relevant Market

After setting the benchmark, the High Court examined the substitutability of QQ with several types of products that were brought to dispute by the two parties.

First, the High Court examined the substitutability between comprehensive IM products (such as QQ) and simplex IM products that offer only textual, audio, or visual communication service. It found them substitutable, after considering both the supply-side substitutability and the demand-side substitutability resulted from the free-charge feature of IM services. Therefore, it included simplex IM products in the relevant market.

The second one was the substitutability of "weibo" sites[10] and social network sites with QQ. In that regard, the High Court took into consideration the following factors:

- The similar instant-communication functions provided by weibo and social network sites,

6 Ibid. ("《指南》第四条规定，相关市场范围的大小主要取决于商品（地域）的可替代程度").

7 Ibid. ("本院则认为本案反映了目前互联网供应商提供产品及服务的一个显著特点，即几乎所有的供应商都将其基础服务的价格确定为零收费").

8 Ibid. ("据此，即便在缺乏完美数据的实际情况下，本案依然可以考虑如果被告持久地（假定为1年）从零价格到小幅度收费后，是否有证据支撑需求者会转向那些具有紧密替代关系的其他商品，从而将这些商品纳入同一相关商品市场的商品集合。").

9 Ibid. ("原告… 在缺乏完美数据的实际情况下，建议就即时通讯产品和其他通讯产品的需求替代性做定性的分析，以评估其他产品的替代性是否可能足以防止一个假设垄断者实行单方面削减质量的水平").

10 "Weibo" sites provide users communication services that are similar to those of Twitter.

- The supposition that a small but non-transitory price increase of QQ would enable users to switch to weibo and social network sites,[11] and
- The need to adopt a prospective view when defining the relevant markets in the highly innovative Internet industry, because the increasingly popular weibo sites would likely develop to an extent of being substitutable with IM products in the near future.

Therefore, the High Court included weibo and social network sites in the relevant market.

The third one was the substitutability of traditional communication products, such as telephones and faxes, with QQ. The High Court excluded them from the relevant market, based on the consideration that their technological settings are different from those of QQ, and the fact that they are not free of charge.

Fourthly, the High Court excluded email products from the relevant market, on the ground that the communication service they offer lacks instantaneity.

Fifthly, the High Court looked at whether different types of online platforms, such as the one operated by the plaintiff (Qihoo, an Internet security software platform) and the one operated by the defendant (QQ, an IM communication platform), should be considered as being in the same product market. There, it accentuated the two-sidedness of online platform businesses.[12] It suggested that, although different platform builders may have different specialties to attract users, they engage in the same competition of attracting advertisers and selling value-added services.[13] However, the High Court did not provide a definitive answer as to whether different online platforms should be included in the same relevant market. It merely stated that, at the time of the judgment, it was uncertain whether a security software platform was substitutable with an IM communication platform, but one should "sufficiently consider the current competition status-quo and market structures in the Internet industry" when defining the markets.[14] In that regard, it emphasized the potential competition posed by providers of different platforms. Eventually, the High Court dismissed the plaintiff's argument that "comprehensive IM product" as a platform alone should constitute the relevant product market.

11 As discussed above, this supposition is questionable, because the SSNIP test may not be applicable in this case.

12 The Guangdong High Court judgment on *Qihoo v Tencent* (note 5 above) ("可见，以免费的服务吸引大量用户，再利用巨大的用户资源经营增值业务和广告以实现盈利，然后以增值业务和广告的盈利支撑免费服务的生存和发展，已经成为互联网行业目前典型的经营模式。").

13 Ibid. ("互联网行业发展至今，选择何种免费产品或服务吸引用户只是搭建平台的手段不同，但竞争的实质就是互联网企业相互之间在各自的应用平台上开展增值服务和广告业务的竞争").

14 Ibid. ("虽然在本案中尚不能确定安全软件平台与即时通讯平台之间存在紧密的替代关系，但在界定本案的相关商品市场时，应充分考虑目前互联网行业的产品竞争状况和市场格局。").

Here, the problem regarding the fifth point is the preferential treatment resulted from the High Court's non-definitive reasoning: by circumventing the question of whether different platforms are (potentially) substitutable, the High Court defined an overly broad product market, at the expense of justifying its conclusion and the expense of the plaintiff's defense rights. Arguably, the High Court should have provided a definitive answer *after* conducting further inquiries and cross-examinations on this issue.

Another problem is the High Court's selective considerations on the two-sidedness of platform products. On the one hand, it accentuated the two-sidedness when discussing the potential competition between providers of different platforms, pointing out that they all compete in attracting advertisers and selling value-added services. As a result, the relevant market was being drawn broadly to the defendant's favor. On the other hand, it chose to neglect such two-sidedness on multiple occasions where it found substitutability on the simple account of the "free of price charge" feature. On those occasions, it failed to show a comprehensive consideration on how the providers of different platform products interact (and potentially compete) with each other.

The High Court also defined the geographic market broadly as a global one. This definition was based on three aspects of consideration: the transnational feature of the Internet industry, the multilingual versions of the product in question, and the limited transportation and technological costs for supplying worldwide. This is arguably a too simplistic understanding of the geographic market in question.

The Unconvincing Finding of No Dominance

When assessing Tencent's position in the defined market, the High Court first looked at the criterion of market share. In that regard, it disregarded the plaintiff's evidence regarding the defendant's market share, on the ground that such evidence was based on a different definition of market. It stated further that, even if the plaintiff's argument were true and entailed a presumption of dominance, that presumption could still be rebutted in light of other dominance-assessment criteria. Regarding these criteria, the High Court engaged in two aspects of examination.

The first aspect of examination pertained to Tencent's ability to control price, quantity, and other trading conditions. The High Court found Tencent possessing no such ability, on the grounds that the product in question was offered free of charge and that there were many other IM products available.

However, here the problem of neglecting the two-sidedness emerged again: by claiming that the users were able to easily switch to a different product (because of the free charge and the plentiful options), the High Court identified consumers as trading parties on *one side* of the platform, but it overlooked that, on *the other side*, advertisers and content providers

were also trading parties for Tencent's IM product. Consequently, the High Court failed to take into account the Tencent's bargaining power over those advertisers and content providers; it also failed to consider the probable network effects generated by content providers on consumers.

The second aspect was about Tencent's ability to restrict competition. The High Court found no such ability, after a four-fold examination:

- *Low barriers to entry and expansion*. The High Court found the entry and expansion barriers to be low, because of the low requirements of investment and technology, the diversified ways of market entry, and the identified examples of new entrants expanding rapidly. Here again, the problem is neglecting the two-sidedness of platform products: The entry could be easy, but due to the existence of network effects, new entrants might only be able to exert a marginal level of competitive pressure instead of a substantial one. Also, a few briefly mentioned examples of new entrants expanding might not be sufficient to prove that the expansion barriers were low.
- *Limited network effects*. The plaintiff held the view that the IM field was characterized with strong network effects, in the sense that users of IM products were "locked in" because their contacts were also using the same IM product. The High Court disapproved that view. Citing the statistics from Facebook, it claimed that the alleged network effects were significantly limited as most users only communicated with close contacts within their social "inner circles". However, here it is questionable whether the statistics from Facebook, which is made unavailable in Mainland China, could have an evidentiary value without any verification on domestic IM providers.[15] The High Court also mentioned the fact that, after being introduced, QQ had quickly surpassed MSN in terms of popularity because of its superior product quality. It used this as an example to support the point that network effects could be overcome. However, arguably this example was simply an indication of competition on quality, instead of proof of limited network effects.
- *Sufficient market competition*. In this regard, the High Court emphasized the innovative and dynamic nature of the IM product market.
- *Tencent's limited capital and technological capability to exclude competitors*. On this point, the High Court briefly mentioned several Internet and telecommunication companies that had strong capital and technological capabilities.

Based on the assessments above, the High Court concluded that Tencent was not dominant in the relevant market, and therefore found no abuse of dominance.

15 Xu Liu, "The Establishment of Dominant Position in the Qihoo v Tencent Dominance Abuse Case: Assessing the Guangdong High Court's Judgment Based on the German and EU Experience (奇虎诉腾讯滥用市场支配地位案中的市场支配地位认定: 参考德国和欧盟经验简析广东省高级法院一审判决)," *Digital Intellectual Property Rights (*电子知识产权*)* 4 (2013): 40 (in Chinese).

2.1.1.2 The Judgment of the Supreme Court

In the appeal review, the Supreme Court also focused on the definition of the market and the finding of dominance. It overruled a few aspects of the Guangdong High Court's market definition, such as the adoption of the SSNIP test and the geographic market delimitation, but it upheld the conclusion of no dominance.[16] The Supreme Court judgment can be summarized as follows.

Market Definition Being Dispensable for the Abuse of Dominance Assessment

For a start, the Supreme Court held that a *clearly defined* market is not prerequisite for assessing an alleged abuse of dominance. As it stated, defining the relevant markets is not an end itself; instead, it serves the aim of assessing the competitive effects of the abuse(s) in question. Moreover, it emphasized the practical challenge of precisely defining a market due to the complexity of facts and the unobtainability of certain facts.[17] Accordingly, it ruled that a clearly defined relevant market should not be required in every abuse of dominance case.[18]

The Supreme Court further suggested that, when a relevant market could not be clearly defined, one could always resort to "direct evidence of competition elimination or impediment" to assess the market position of an undertaking and the competitive effects of the abuse(s) in question.[19] The Supreme Court did not specify what qualifies as such "direct evidence". Therefore theoretically speaking, a wide range of criteria for determining dominance could fit in that phrase, such as the existence of a certain type of abusive conduct.[20]

16 This Section focuses on the legal reasoning of this judgment, for the purpose of describing and appraising its theory of harm in terms of its logic coherence and economic sensibility. Procedural issues are not discussed here, although scholars have identified many. For example, see Liu Xu, *Brief Comments on the* Qihoo v Tencent *Judgment by Supreme People's Court* (简评最高人民法院二审奇虎诉腾讯滥用市场支配案), Zhihu Website, November 22, 2014, https://zhuanlan.zhihu.com/p/19899598 (in Chinese) (accessed November 15, 2018).

17 The Supreme People's Court, *Qihoo v Tencent (appeal)* (中华人民共和国最高人民法院民事判决书[2013]民三终字第4号), October 8, 2014, http://www.court.gov.cn/upload/file/2014/10/16/10/P020141016384975398 11.docx (in Chinese) (accessed November 14, 2018), 77–78 (hereinafter, "the Supreme Court judgment on *Qihoo v Tencent*").

18 Ibid., 78 ("并非在每一个滥用市场支配地位的案件中均必须明确而清楚地界定相关市场").

19 Ibid.

20 In EU competition law, the CJEU also accepts "the very existence of an abusive practice" as an indicator of dominance under Art 102 TFEU. See Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, para 68 (stating that, in an effort to find dominance, "it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses").

Rejecting the Applicability of the SSNIP Test to Online-Platform Markets

The Supreme Court overruled the Guangdong High Court's application of the SSNIP test. First, it noted that the SSNIP test is difficult to apply to markets where product differentiation is significant and undertakings compete intensively in non-price aspects. On that basis, it suggested that "small but significant non-transitory decrease in quality" ("SSNDQ") would be more suitable.[21]

Subsequently, the Supreme Court examined the particularities of the industry involved in this case. It observed that Internet-related product/service providers usually adopt two-sided business models, using revenues from the value-added services and advertisements to sustain the free services offered to users.[22] It also observed that users are highly sensitive to price changes, in the sense that cancelling the free offering could result in significant user loss, therefore endangering the whole two-sided business model. Thus, it decided that the SSNIP test is inappropriate for this case and opted for an SSNDQ analysis. It clarified that such an SSNDQ analysis would have to be qualitative, since quantitative data were difficult to obtain.[23]

A Narrower but not Conclusion-Altering Market Definition

The Supreme Court re-examined the substitutability of the various types of products with QQ. First, it considered non-comprehensive (in the form of textual, audio or visual) IM products to be part of the relevant product market. It gave four reasons: their similar product characteristics, equally easy obtainability, the fact that different user preferences downplayed their functional differences, and the feasibility of simplex IM products transitioning into comprehensive ones.[24]

The Supreme Court also discussed whether IM products on smart phones should be deemed substitutable with the product type in question, namely IM software installed on PCs. This issue was not addressed in the first instance judgment, but the Supreme Court added it by exerting its purview. It noted that, at the time of the alleged abuses, smart phone consumption was booming and had already developed to a significant scale. In that light, it took a prospective view and included mobile IM products in the relevant market.[25]

The Supreme Court disagreed with the Guangdong High Court that weibo and other social network sites formed part of the relevant market. The reason was that their product

21 The Supreme Court judgment on *Qihoo v Tencent*, 79.
22 Ibid., 80.
23 Ibid., 81.
24 Ibid., 82–83.
25 Ibid., 84–85.

features and functions were very different.[26] For the same reason, it also excluded mobile SMS services and email services from the relevant market.[27]

The Supreme Court downplayed the Guangdong High Court's consideration on the platform feature of Internet-related products when defining the relevant market.[28] It pointed out that there was no empirical evidence proving that the two-sidedness of online platforms had enabled competition to completely transcend the boundaries between different product types.[29]

Notably, when downplaying this consideration, the Supreme Court shed light on its understanding of the suspected harm of the "choose one from the two" practice: the risk of Tencent leveraging its (suspected) dominant power in the IM software field to restrict competition in the Internet security software field.[30] Therefore, the anticompetitive effects (if there were any) would be in a market different from the defined one. The Supreme Court did not take any steps to delineate that market.

Lastly, the Supreme Court redefined the geographic market as one limited to Mainland China. Its considerations included the following: domestic users' observable lack of interest in foreign IM products, and the legal obstacles for similar foreign products to enter Mainland China.[31]

Therefore, the Supreme Court narrowed to a certain extent the relevant market that the Guangdong High Court originally defined. However, that extent of narrowing was not enough to alter the conclusion of no dominance by Tencent, as the Supreme Court followed the dominance-assessment criteria advanced by the Guangdong High Court and eventually reached consistent conclusions.[32] Critically speaking, by being brief and deferential in the dominance assessment, the Supreme Court cleared the above-identified problems in the Guangdong High Court's reasoning without thorough review. The implication is that the Supreme Court created an analytical route for establishing dominance in an online-platform scenario that is arguably farfetched. This analytical route is likely to misguide subsequent cases with similar circumstances.

26 Ibid., 87, 89.
27 Ibid., 89–91.
28 Ibid., 93.
29 Ibid., 91–92.
30 Ibid., 92.
31 Ibid., 94–96.
32 Ibid., 99–106.

2.1.2 The *Qualcomm* Decision

This was a NDRC case closed in 2015.[33] In this case, Qualcomm was accused of abusing its dominant positions in two sets of markets:

(1) The national markets for the licensing of Standard Essential Patents ("SEPs") used in CDMA, WCDMA, and LTE wireless communications, and
(2) The international markets for the supply of baseband chipsets used in CDMA, WCDMA, and LTE wireless communications.

Three types of abusive conduct were identified: excessive pricing, tying, and imposing unreasonable sales conditions. Eventually, the NDRC imposed a CNY 6.088 Billion (approximately USD 0.96 Billion) fine, the largest amount of financial sanction in the AML tripartite era. This is the first AML case that involved intellectual property rights. Therefore, although there is nothing strange about it, the NDRC's dominance assessment in this case is introduced here, for the purpose of painting a more nuanced picture of how dominance assessments are performed under the AML.

2.1.2.1 The NDRC's Findings of Dominance

Three Aspects of Consideration

The NDRC found dominance in the SEPs licensing markets. It relied on three aspects of consideration.

The first one is market share. According to the NDRC, once a patent is adopted as an SEP, that patent becomes irreplaceable and excludes all competition with other patents, including essential patents from older generations of standards and non-essential patents. The NDRC considered the non-substitutability of such SEPs from both the demand side and the supply side. It found that, by holding such SEPs, Qualcomm had a 100% market share of each SEP market in question.

Subsequently, the NDRC considered two other aspects: Qualcomm's bargaining power against patent licensees (namely manufacturers of wireless communication terminals) and the barriers to entry. By highlighting the irreplaceability of an SEP, the NDRC found that both aspects confirmed the finding of dominance.

The NDRC also found dominance in the baseband chipset markets. The aspects considered were similar to the ones mentioned above: market share (including the contrasts of market shares of Qualcomm and its competitors), the bargaining power against buyers, and entry

33 The NDRC, *The Qualcomm Decision* (中华人民共和国国家发展和改革委员会行政处罚决定书 发改办价监处罚[2015]1号), February 9, 2015, http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201503/t20150302_666176.html (in Chinese) (accessed November 15, 2018). There was no pagination in the official online version of this decision. In that light, page-specific references to this decision are omitted here and in subsequent descriptions of this case.

barriers. The NDRC found Qualcomm's market shares to be above 50%, which entailed the presumption of dominance under first paragraph (1) of Art 19 AML. It found the vast contrast of market shares, the dominating bargaining power over buyers and the high entry barriers to have confirmed that presumption of dominance.

2.1.3 Yang Zhiyong v China Telecom

This was a private enforcement case, the appeal judgment of which was delivered by the Shanghai High Court in 2015.[34] The plaintiff and the appellant, Yang Zhiyong, accused China Telecom of dominance abuse by committing two practices: excessive pricing and imposing unreasonable trading conditions.

2.1.3.1 The Shanghai High Court's Circumvention of the Dominance Assessment

An Abuse Examination without a Prior Finding of Dominance

What makes this case stand out is that the Shanghai High Court assessed the anticompetitiveness of the practices in question without a prior finding of dominance. The High Court started its reasoning by highlighting the general principle of "who claims, who proves" in civil litigation. It held that, when accusing a defendant of abusing its dominant position, the plaintiff of an AML suit should present three aspects of proof:

- The defendant holding a dominant position in the relevant market;
- The existence of an abusive practice that is prohibited by the AML;
- The existence of anticompetitive outcomes resulted from the abusive practice.

Subsequently, the High Court stated that the third aspect is prerequisite for antitrust intervention and therefore dedicated the remaining part of the judgment to examining that aspect.[35] Eventually, it ruled in favor of the defendant, on the ground that the plaintiff did not provide sufficient evidence to demonstrate the existence of anticompetitive outcomes.

The strange thing is that the High Court completely overlooked the need for defining the relevant market and finding a dominant position. This was problematic, for it suggested that the anticompetitiveness of an allegedly abusive practice could be assessed without the finding of a dominant position beforehand. In that sense, the High Court contradicted the Supreme Court's reasoning in *Qihoo v Tencent*, which explicitly construed the finding of

34 The Shanghai High People's Court, *Yang Zhiyong v China Telecom (appeal)* (杨志勇与中国电信股份有限公司、中国电信股份有限公司上海分公司滥用市场支配地位纠纷二审民事判决书 [2015]沪高民三（知）终字第23号), December 14, 2015, http://wenshu.court.gov.cn/content/content?DocID=025efcd7-7c54-454b-98ad-8f6fb329ad6a (in Chinese) (accessed November 15, 2018). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references need to be made, this chapter directly quotes the relevant sentences in the judgment.

35 Ibid. ("鉴于，产生严重损害市场竞争效果是对市场行为进行反垄断干预的必要前提，在下文的分析中，本院更关注在市场效果方面，是否存在涉案行为严重损害市场竞争的充分证据。").

dominance as a prerequisite step for assessing the anticompetitiveness of a practice. As the Supreme Court stated in *Qihoo v Tencent*,

> In principle, if the defendant undertaking did not hold a market dominant position, it would not be necessary to examine whether it abused the dominant position; instead, in that case, it can be ruled directly that there was no abuse of dominance prohibited by the AML. However, when the boundaries of the relevant market were blurry and the defendant undertaking's dominant position was not definitively established, one can further analyze the competitive impact of the monopoly conduct in question, so as to verify whether the conclusion regarding the defendant's dominant position is right or not.[36]

Admittedly, according to the High Court's case description, the plaintiff did not provide sufficient evidence to prove the defendant's dominance. Nonetheless, it is questionable whether the plaintiff's failure to meet the rather high standard of proof would give the High Court enough justification to bypass the dominance assessment altogether. Arguably, in the event that the plaintiff could not meet the standard of proving the defendant's dominance, the High Court should have dismissed the action or it should have exerted its inquisitional power to conduct the dominance assessment, as the Supreme Court had done in *Qihoo v Tencent*.

In any event, the High Court invented a theory of harm that is arguably distortive: according to the High Court's analytical route, one would be able to find anticompetitiveness (or the lack thereof) without conceptually adhering to the "abuse of dominance" paradigm that is implicit in the AML and confirmed by the Supreme Court.

2.2 Excessive Pricing

2.2.1 The *Qualcomm* Decision

The NDRC identified three types of abuse in this case: excessive pricing, tying, and imposing unreasonable sales conditions. This subsection discusses the first one. The other two are discussed in Section 2.3.1.

2.2.1.1 The NDRC's Theory of Harm

The Unfairness of Overpricing

The first offense in this case was overpricing. It consisted of two aspects:

(1) Charging licensing fees for expired SEPs, and
(2) Obliging certain licensees to grant reversely non-essential licenses or to grant licenses for free, and prohibiting certain licensees from legally challenging the relevant licenses.

36 The Supreme Court judgment on *Qihoo v Tencent*, 106.

The underlying harm was *unfairness*. Regarding the first aspect, the NDRC held that, when there were new patents entering and expired patents exiting the patent package, it would be unreasonable for Qualcomm to apply the same licensing-fee standard without providing a list of the patents included in that package. According to the NDRC, that way of doing obscured the contract object, thereby enabling Qualcomm to charge for expired patents. Regarding the second aspect, the NDRC held that those obligations were unreasonable, because they did not consider or compensate the values of those licensees' patents. On that basis, the NDRC alleged the harm of unfairness. Additionally, it also referred to the harm of *innovation inhibition* and the harm of *competition restriction*, but it did not expand on them. As it stated briefly, the reverse-licensing obligation inhibited the innovation incentives of Qualcomm's licensees; that obligation also brought Qualcomm undue competitive advantages over other baseband chipset producers, therefore impairing competition in that market.

2.2.2 The *Zhejiang Second Pharmaceutical & Tianjin Handewei Pharmaceutical* Decision

This was a NDRC case closed in 2017. Two undertakings, Zhengjiang Second Pharmaceutical and Tianjin Handewei Pharmaceutical, were accused of abusing their collective dominant position in the national market for isoniazid as a pharmaceutical ingredient.[37]

2.2.2.1 The NDRC's Theory of Harm

First, the NDRC found collective dominance by these two undertakings. It observed that there had only been three producers of isoniazid by the time of decision, and that the combined sales of the two undertakings in question had remained consistently above 77.14% of the total market sales from 2013 to 2016. Therefore, the NDRC presumed collective dominance, pursuant to first paragraph (2) of Art 19 AML. Subsequently, it confirmed that presumption by briefly looking at the level of customer dependency and entry barriers.

The NDRC found two abuses. The first one was excessive pricing and the second one refusal to supply. Regarding the first abuse, the NDRC considered that the significant price-increases[38] by these two undertakings were not objectively justified and therefore constituted excessive pricing within the meaning of first paragraph (1) of Art 17 AML. The second abuse is discussed in Section 2.8.3.

37 The NDRC, *The Zhejiang Second Pharmaceutical & Tianjin Handewei Pharmaceutical Decision* (国家发展和改革委员会行政处罚决定书[2017] 1–2号), July 28, 2017, http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201708/t20170815_857738.html, http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201708/t20170815_857736.html (in Chinese) (accessed November 15, 2018). There was no pagination in the official online version of these decisions. In that light, page-specific references to these decisions are omitted here and in subsequent descriptions of this case.

38 The exact price numbers were not disclosed.

2.3 Tying and the Imposition of Unreasonable Trading Conditions

2.3.1 The *Qualcomm* Decision

The second and third offenses in this case were tying and the imposition of unreasonable trading conditions. Both are stipulated in first paragraph (5) of Art 17 AML, which reads that dominant undertakings are prohibited from "without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions".

2.3.1.1 The NDRC's Theory of Harm

The Tying: Customer Choice Limitation as a Proxy Concern for Competition Foreclosure

The second offense against Qualcomm was tying its SEPs with non-essential patents. Although very brief, the NDRC's reasoning adhered to the four general conditions for finding an abusive tying:

- Two separate product markets,
- Dominance in the tying product market,
- Coercion without justification, and
- The effect of competition restriction in the tied product market.[39]

In that light, although not expressly alleged, the underlying harm of this offense can be inferred as *competition foreclosure*. To verify that harm, the NDRC used "customer choice limitation" as a proxy, thereby saving the effort of engaging in a circumstantial examination on how competition in the non-essential patent markets was being restricted. As it stated, because non-essential patents were tied to SEPs, normally rational licensees would not spend additional costs to bypass those patents or seek alternative patents in their product designs. Therefore, it considered Qualcomm's competitors in those non-essential patents to have been severely undermined.

The Imposition of Unreasonable Trading Conditions: A Misplaced Concern for Downstream Competition

The third offense was the imposition of unfair trading conditions in the sales of baseband chipsets. According to the NDRC, the conduct in question was that Qualcomm imposed on chipset buyers the trading condition that they must sign and must not challenge agreements licensing Qualcomm's patents; otherwise Qualcomm would cut off their baseband chipsets supplies. The NDRC stated that this conduct was an exploitation of Qualcomm's dominance in the baseband chipset markets so as to force the customers into accepting Qualcomm's unreasonable patent licensing contracts. It considered this conduct to be a violation of first paragraph (5) of Art 17 AML.

39 These four conditions are widely established across jurisdictions. See for example, the European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, [February 24, 2009] OJ C45/7, paras 50–51 (hereinafter, "the Commission Guidance Paper"). See also, Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford: Hart Publishing, 2010), 225.

The harm alleged by the NDRC was *competition restriction in the downstream markets* where the customers competed with each other. According to the NDRC, because the actual and potential customers were highly dependent upon Qualcomm's baseband chipset supplies, those who were disobedient to Qualcomm would be forced out of the various wireless communication terminal markets that they operated in. No further analysis was provided.

However, it is questionable whether this alleged harm captured the essence of the conduct in question. First of all, according to the NDRC's description, the offense was that Qualcomm used its dominance in the supply of baseband chipsets to aggressively promote its patent-licensing business. In that sense, this offense could alternatively be characterized as a tying practice. Consequently, it would make more sense if the harm were alleged as competition foreclosure in the tied product market, which, in this case, would be the market of non-essential patent licensing. Secondly, even if the NDRC chose to describe the harm from the perspective of the chipset customers, it would probably make more sense to phrase the harm as "customer exploitation" instead of "downstream competition restriction". This is because, to discuss the kind of downstream competition restriction in this case, one has to verify the existence and the extent of differential treatment by the upstream dominant undertaking; unfortunately in this case, there was no mentioning of such differential treatment.

2.3.2 The *Tetra Pak* Decision

This was a SAIC case closed in 2016. It is the most time-consuming case in the AML tripartite era. It also holds the records of being the longest AML enforcement decision in the tripartite era and having the largest amount of fine imposed by the SAIC.[40] In this case, Tetra Pak was accused of committing three types of abuse: tying, exclusive dealing, and loyalty rebates. This subsection deals with the first one, while the other two are discussed respectively in Section 2.4.1 and Section 2.6.1.

The SAIC defined the relevant product markets as the following: (1) the market for paper-based aseptic packaging equipment, (2) the market for technical services for paper-based aseptic packaging equipment, and (3) the market for paper-based aseptic packaging materials. The geographic market was limited to Mainland China.

The SAIC found dominance by Tetra Pak in all the relevant markets, after considering four sets of criteria: (1) market share and the competitive situation in the market, (2) market-control power, (3) the level of dependence of other operators, and (4) entry barriers of the relevant markets.

40 Xingyu Yan, "Whither Antitrust Regulation of Loyalty Rebates in China: The Tetra Pak Decision and Lessons from the EU," *World Competition* 40, no. 4 (2017): 613–14.

2.3.2.1 The SAIC's Theory of Harm

The Harm of Competition Restriction and the Proxy Concern for Customer Choice Limitation

The tying in questions had two components: (1) tying the sale of packaging materials with the supply of packaging equipment, and (2) tying the sale of packaging materials with the supply of technical services.[41] The packaging materials were the tied product and the packaging equipment and technical services were the tying products. The first component of the tying was divided into three stages: tying during the performance confirmation period, tying during the warranty period, and tying during the leasing period. In fact, the SAIC's description of the first component concurred with the abusive tying that Tetra Pak committed in the EU more than two decades ago.[42]

The alleged harm was *competition restriction* in the packaging material market.[43] The SAIC's theory of harm was brief: it implicitly followed the four-condition logic for finding an abusive tying,[44] and divided the analysis into four parts to describe the tying in question. The SAIC's analysis accentuated the unjustified coerciveness of the tying. In other words, it focused on explaining the severability of the tying and the tied products, and the unjustified limitation on customer choice. In that sense, just like the NDRC in *Qualcomm*, the SAIC viewed the limitation on customer choice as a proxy concern for verifying the harm of competition restriction.

By doing so, the SAIC refrained from engaging in any further exclusionary effects examination. For example, it did not discuss whether (and if yes, to what extent) Tetra Pak's dominance in the tied product market, as it had established, contributed to the exclusionary effects of the tying. In that light, one could say that the SAIC's examination under the fourth condition, namely "the effect of competition restriction in the tied market", is largely presumptive. Given the case circumstances, it would have been very easy for the SAIC to satisfy the fourth condition, had it decided to expand on that.

Therefore, it seems that both the *Qualcomm* decision and the *Tetra Pak* decision, with their common approach of using the proxy concern of customer choice limitation to save the efforts of examining the competition-restrictive effects in the tied market, are pioneering a

41 The SAIC, *The Tetra Pak Decision* (国家工商行政管理总局行政处罚决定书 工商竞争 案字[2016]1号), November 9, 2016, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853689741679.pdf (in Chinese) (accessed November 15, 2018), 20–22 (hereinafter, "the SAIC decision on *Tetra Pak*").

42 Case C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I 5951, paras 34–38; Case T-83/91 *Tetra Pak International SA v Commission of the European Communities* [1994] ECR II 755, paras 134–141; Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 —Tetra Pak II), para 146.

43 The SAIC decision on *Tetra Pak*, 23 ("我局认为，利乐在提供设备和技术服务过程中搭售包材没有正当理由且损害了包材市场的竞争").

44 See note 39 above.

theory of harm on tying that is practically presumptive. This corresponds to the *quasi-per se* abusive test on tying in the EU context.[45]

2.3.3 Other Regional Enforcement Decisions

By the time of May 24, 2018, there were twelve cases at the regional level concerning tying and the imposition of unreasonable trading conditions within the meaning of first paragraph (5) of Art 17 AML.

2.3.3.1 A General Observation: The Commonly Alleged Harm of Customer Exploitation and an Explanation for It

Notably in most of these regional cases, state intervention played a significant role in the making of the dominant undertakings: in most of these cases, the undertakings in question were able to advance to a dominant or monopoly position simply because of certain degrees of state-conferred privileges. For example, in some cases, tobacco producers were found holding monopoly positions, thanks to the exclusive-trading licenses granted to them; water and gas suppliers were able to hide behind high entry barriers erected by local governments, because their products were of a public nature. In some other cases, undertakings attained monopoly with the help of favorable governmental contracts.

Supposedly, the AML is only able to regulate these privileged undertakings to the extent that their monopolistic conduct exceeds beyond the toleration of the AML. In other words, the AML as such is not enough to prevent those undertakings from distorting market competition; there should be "upstream" rules in place to monitor the empowering of those undertakings. Otherwise, the AML faces the problem of being overburdened with monopolistic practices that could have been prevented at an earlier stage.

Based on the critical description of the following cases, this dissertation argues that the lack of such "upstream" rules has indeed impacted the AML enforcement: having to make up for the lack of upstream supervision on those privileged undertakings, the AML enforcement has been overrun with cases of customer exploitation, instead of cases of competition foreclosure. This is evidenced by the fact that, in most of these cases, there was no competition to even begin with, thanks to the prevalent state intervention in various types of markets.

2.3.3.2 The Cases Concerning Water and Gas Supplies

Six of the twelve cases were about water and gas supplies. These cases followed more or less the same analytical route: First, the AIC at hand observed that such supplies had

45 Nicholas Economides and Ioannis Lianos, "The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the Microsoft Cases," *Antitrust Law Journal* 76, no. 2 (2009): 536 (observing an initial hostile stance of the EU competition law towards tying, as exemplified by the *quasi-per se* abusive test in *Hilti* and *Tetra Pak II*).

a public nature, which entailed the state-imposed high barriers and the legal monopoly status of the supplier in question. Subsequently, the AIC identified the abuse(s) in question and alleged the types of harm at hand. The harm of monopoly exploitation was commonly alleged in these cases.

In the *Guangdong Dayawan Yiyuan Water Supply* case, the AIC of Guangdong Province identified an abusive tying between "temporary water supply to commercial-housing construction sites" (the tying product) and "the construction of water pipelines and their affiliated facilities" (the tied product),[46] after finding the undertaking in question, Dayawan Yiyuan Water, to be a legal monopoly in the relevant market.[47] It made three allegations of harm:

- The exclusion of competitors in the tied product market, resulted from the leveraging of market power;[48]
- The limitation on customer choice;[49]
- Monopolistic customer exploitation resulted from the unreasonably high prices.[50]

The third allegation is questionable as to whether it was inherently related to the tying practice or to an exploitative pricing practice independent from and consequential to the tying practice. According to the AIC's brief clarification on this harm, the answer seems to be the latter. In that event, the second harm allegation also raises questions: since the AIC provided no elaboration, this allegation of harm could accommodate multiple concerns: it could be explained either as a proxy concern for competition foreclosure in the tied market, or as a fairness concern about the monopolistic exploitation of customers, or both. Since this was a monopolized market where there was no competition in the first place, it is possible that the AIC incorporated both concerns in this harm allegation.

In the *Chongqing Natural Gas* case, the AIC of Chongqing Municipality found the undertaking in question, Chongqing Natural Gas, to be the bigger one of the dual oligopolies in the relevant market.[51] It identified an abuse in the form of imposing unreasonable trading conditions within the meaning of first paragraph (5) of Art 17 AML.[52] It made two allegations of harm: the limitation on customer choice and customer exploitation through price increase.[53] No foreclosure of competition was mentioned.

46 The SAIC, *The Guangdong Dayawan Yiyuan Water Supply Case* (竞争执法公告2014年第13号 广东惠州大亚湾溢源净水有限公司滥用市场支配地位案), December 2013, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853615927696.doc (in Chinese) (accessed November 15, 2018), 5.

47 Ibid., 3–4.

48 Ibid., 9–10.

49 Ibid., 10.

50 Ibid., 11.

51 The SAIC, *The Chongqing Natural Gas Case* (竞争执法公告2014年第19号 重庆燃气集团股份有限公司垄断行为案), April 2014, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853628587057.doc (in Chinese) (accessed November 15, 2018), 3–4.

52 Ibid., 12.

53 Ibid., 7.

In the *Hainan Dongfang Tap Water* case, the AIC of Hainan Province found legal monopoly by the undertaking in question, Dongfang Tap Water.[54] The abuse was the imposition of unreasonable trading conditions by charging the customers (consisting of household users and enterprise users) certain amounts of deposits and installing a very strict refund policy.[55] The AIC considered this deposit scheme to be a way to preemptively transfer potential business risks to the customers and therefore unjustified.[56] It briefly alleged three aspects of harm: the undue burdening of the household users, the undue burdening of the enterprise users, and the undermining of the undertaking's incentive to improve service, since the business risk had been transferred to its customers.[57]

A similar logic was adopted in the *Qingdao Xin'ao Xincheng Natural Gas* case. There, the undertaking in question was Xin'ao Xincheng Natural Gas, a sino-foreign joint venture. The AIC of Shandong Province found it to be a legal monopoly in the relevant market.[58] The AIC found the conduct in question—an advance payment scheme—to be an unjustified imposition of unreasonable trading conditions.[59] The AIC briefly alleged, without further analysis, three aspects of harm:

- The increase of burdens on those commercial entity customers;
- The hindrance of the development of the local natural gas industry, in the sense that this conduct helped sustain the monopoly. This aspect could accommodate both exclusionary and exploitative concerns; and
- The unfairness inherent in this conduct.[60]

So was the *Alxa Left Banner Water Supply* case. The AIC of Inner Mongolian Autonomous Region found Alxa Water, a legal monopoly in the defined market, to have committed two tying practices: (1) tying the purchase of a particular type of water meter with the water supply, and (2) tying the service of water pipeline construction with the water supply.[61] Additionally, the AIC found that both tied products were excessively priced. It found these two tying schemes to be unjustified.[62] On that basis, it alleged three aspects of harm:

54 The SAIC, *The Hainan Dongfang Tap Water Case* (竞争执法公告2015年第2号 海南省东方市自来水公司垄断案), January 2015, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853635582697.doc (in Chinese) (accessed November 15, 2018), 5–6.

55 Ibid., 7–8, 17–18.

56 Ibid., 10.

57 Ibid., 12.

58 The SAIC, *The Qingdao Xin'ao Xincheng Natural Gas Case* (竞争执法公告2016年第2号 青岛新奥新城燃气有限公司滥用市场支配地位案), March 21, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201605/P020171215329962903967.doc (in Chinese) (accessed November 15, 2018), 4.

59 Ibid., 5–7.

60 Ibid., 7–8.

61 The SAIC, *The Alxa Left Banner Water Supply Case* (竞争执法公告2016年第4号内蒙古自治区阿拉善左旗城市给排水公司滥用市场支配地位案), April 22, 2016, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853680251259.doc (in Chinese) (accessed November 15, 2018), 5–6.

62 Ibid., 7.

- The foreclosure of competition in tied markets, namely the market for water meters and the market for water pipeline construction;
- The deprivation of customers' choices;
- The increase of burdens on consumers and business entities resulted from the fact that these tied products were also overpriced.[63]

So was the *Wujiang Huayan Water Supply* case. There, the AIC of Jiangsu Province found the undertaking in question, Huayan, to be a legal monopoly in the relevant market since 2005.[64] The conduct in question was that, when supplying water, Huayan required its customers (who were real-estate developers) to contract with its subsidiary company for pipeline constructions and to purchase the types of construction material designated by Huayan.[65] The AIC characterized this conduct as tying and the imposition of unreasonable trading conditions within the meaning of first paragraph (5) of Art 17 AML.[66] However, by its description, this conduct could also be alternatively characterized as restrictive dealing within the meaning of first paragraph (4) of Art 17 AML.[67] Either way, the AIC found this conduct unjustified, on the grounds that it coerced customers and had no legal basis.[68] It alleged three aspects of harm:

- The restriction of competition in the markets for pipeline construction and pipeline material;
- The limitation on customer choice;
- The burdening of customers and end-consumers, in the sense that the tied construction service and pipeline material were priced higher that the market prices of their substitutable products.[69]

2.3.3.3 The Cases Concerning the Tobacco Trade and the Salt Industry

The tobacco trade in China has been operated under an exclusive licensing system. Each tobacco wholesaler is state-owned and is granted legal monopoly within the administrative territory it operates in. There were two cases concerning abuses by tobacco companies.

The first one was the *Inner Mongolia Chifeng Tobacco* case. The Inner Mongolian AIC established the monopoly status of the undertaking in question, the Chifeng Branch of Inner Mongolian Tobacco ("Chifeng Tobacco"), on account of the exclusive licensing

63 Ibid., 8–9.

64 The SAIC, *The Wujiang Huayan Water Supply Case* (竞争执法公告2017年3号　吴江华衍水务有限公司滥用市场支配地位案), December 30, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201702/P020170301721120358205.doc (in Chinese) (accessed November 15, 2018), 3–4.

65 Ibid., 5–10.

66 Ibid., 19.

67 The link between "tying" (first paragraph (5) of Art 17 AML) and "restrictive dealing" (first paragraph (4) of Art 17 AML) is further explained in Section 2.5 of this chapter.

68 The SAIC decision on the *Wujiang Huayan Water Supply* case (note 64 above), 12–13.

69 Ibid., 15–16.

system.[70] The AIC characterized the conduct in question as tying. It described this conduct from the following aspects. First, as a cigarette wholesaler, Chifeng Tobacco classified its retailers into various levels according to (1) the quantity of each one's monthly purchase and (2) their individual sales revenue.[71] Based on this classification, it imposed on each retailer an individualized quota regarding the volumes of "high-demand cigarettes" that a retailer could purchase according to the level it was at.[72] According to the AIC's observation, having ample stocks of the high-demand types of cigarettes was the only way for the retailers to remain viable in the market, and Chifeng Tobacco was using that as a leverage to unload unpopular types of cigarettes onto the retailers.[73] The AIC also observed that, because of this quota-imposition, the only way for the retailers to retain or increase the stock of "high-demand cigarettes" was to purchase more "low-demand cigarettes" as required.[74] The AIC identified the "high-demand cigarettes" as the tying product whereas the "low-demand cigarettes" as the tied one.[75]

Supposedly, the anticompetitiveness of tying normally lies in the foreclosure of competition in the tied market.[76] However, this issue was not discussed at all in this case. In fact, the AIC did not even define the tying and the tied markets; it only drew a vague distinction of "high-demand cigarettes" and "low-demand cigarettes". Admittedly, under the established premise that Chifeng Tobacco held legal monopoly over the wholesale of all types of cigarettes within the defined territory, there should be no competition left in the tied market for Chifeng Tobacco to foreclose. In that sense, the tying in question was not raising competition-foreclosure concerns; it was raising monopoly-exploitation ones. This was exemplified in the AIC's two allegations of harm:[77]

- The impairment of the retailers' benefits, in the sense that retailers were forced to purchase "low-demand cigarettes" at the expense of flowing investments;
- The impairment of consumer interests, in the sense that consumers were deprived of the benefits of quality competition among the manufacturers.
- Additionally, the disruption of the competitive order in the upstream market of tobacco manufacturing. But the AIC provided no further explanation on this.

70 The SAIC, *The Inner Mongolia Chifeng Tobacco Case* (竞争执法公告2014年第16号 内蒙古自治区烟草公司赤峰市公司滥用市场支配地位案), July 2014, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853621015463.doc (in Chinese) (accessed November 15, 2018), 3.

71 Ibid., 4.

72 Ibid., 4–5.

73 Ibid., 8 ("实质上是利用零售商将畅销卷烟品种及数量供应是否充裕作为市场竞争重要手段的心里…强制零售商订购平销卷烟").

74 Ibid., 7.

75 Ibid. ("当事人的这种货源管理办法，实质上是借助零售商月均购进量及月均购进商品单位价格排序，在畅销商品配额与平销商品购进量之间建立起了一种正相关的数量关系，是一种以捆绑销售方式出现的变相搭售行为").

76 See for example, the Commission Guidance Paper (note 39 above), para 52.

77 The SAIC decision on the *Inner Mongolia Chifeng Tobacco* case (note 70 above), 9–10.

A closer look at the three allegations would suggest that they did not stand on their own; instead, they were just the concern for monopolistic exploitation elaborated at different levels. No foreclosure concern really entered into the analysis. For example, regarding the third allegation, the AIC considered Chifeng Tobacco to have disrupted the upstream competitive order by passing the costs of outdated production onto the consumers, thereby shielding the upstream tobacco manufacturers away from quality competition.[78] Notably, there was no mentioning of differential treatment of tobacco manufacturers, and therefore the rationale of "secondary-line competition restriction" did not apply here.[79] In that sense, although this allegation of harm was phrased as "the disruption of competition order in the upstream market", it was actually about the exploitation of consumers by depriving them the benefits of quality competition among those manufacturers. Accordingly, the first and the second allegations were just further explanations of that exploitation respectively at the retailing stage and the consumption stage.

The second case was the *Liaoning Fushun Tobacco* case. The accused undertaking was the Fushun Branch of Liaoning Tobacco ("Fushun Tobacco"). The AIC of Liaoning Province found it to be a legal monopoly in the relevant market.[80] The AIC identified the conduct in question as tying. The tying product was "high-demand cigarettes", and the tied product was "low-demand cigarettes". Fushun Tobacco used to draw up a bundling program every week, and required all retailers to choose a bundling option and to make purchases accordingly.[81] The AIC did not perform any legal analysis on this tying practice; the closest thing it did was discussing the AML's applicability on tobacco wholesalers.[82] It briefly alleged two aspects of harm:

- Monopoly exploitation. As the AIC stated, "From a perspective of reasonableness, the tying restricted the retailers' freedom of choice, and aggravated their financial burdens".[83]
- Competition undermining. In this regard, the AIC claimed that the tying had adverse effects on competition at both the downstream (retail) level and the upstream (manufacturing) level.[84]

78 Ibid., 9.

79 Hans Zenger, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics* 8, no. 4 (2012): 741, https://doi.org/10.1093/joclec/nhs023 (introducing the concepts of "primary-line competition distortion" and "secondary-line competition distortion").

80 The SAIC, *The Liaoning Fushun Tobacco Case* (竞争执法公告2015年第7号 辽宁省烟草公司抚顺市公司滥用市场支配地位案), June 2015, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201508/P020170302063673892058.doc (in Chinese) (accessed November 15, 2018), 2–3.

81 Ibid., 4–5.

82 Ibid., 5–6.

83 Ibid., 7 ("既限制了烟草零售商对进货数量和品牌种类的自由选择权，又给烟草零售商增加了资金负担").

84 Ibid., 7–8.

The second allegation of harm did not fit into the typical anticompetitive profile of tying, which focuses on the leveraging of market power from the tying market to the tied market. The AIC did not clarify exactly how those alleged adverse effects would come about. In that light, this allegation could only be understood as a rhetoric attempt to accentuate the exploitative harm.

Lastly, there was the *Yongzhou Salt Industry* case. Similar to the tobacco trade, the salt industry in China used to be operated under an exclusive-licensing system as well. This system was abandoned only several years later after the time of the conduct in question. On that account, the AIC of Hunan Province found legal monopoly by the undertaking in question, Yongzhou Salt.[85] The conduct in question was that, from January 2014 to March 2015, Yongzhou Salt tied the sales of "unsalable types of salt" with the sales of "best-selling types of salt".[86] The AIC alleged two aspects of harm, which were rather rhetoric and had no further analysis:

- The disruption of the market supply-demand relationship and the proper allocation of market resources;
- The impairment of the interests of the retailers and consumers.[87]

2.3.3.4 Other Cases Involving Monopoly Positions

There were three other cases where monopolies were presented, either because of direct administrative interventions, or indirectly through exclusive contracts.

In the *XilinGol League Broadcast Television* case, the accused undertaking was the XilinGol League branch company of Inner Mongolian Broadcast Television Network ("XilinGol Television"). It is a state-owned enterprise. The Inner Mongolian AIC defined the relevant product market as the one for television service broadcasted through cable (cable TV) and Internet protocol (IPTV).[88] It defined the geographic scope as the Municipality of Xilinhot, considering that the relevant administrative rules permit only one operator within each municipality for cable TV, and that IPTV faces similar geographical limitations.[89] The AIC found XilinGol Television to be a monopoly in the relevant market, as a result of the administrative intervention. It found one marginalized competitor, namely XilinGol Unicom, having only 1.4% market share in terms of IPTV service.[90] The conduct in question was

85 The SAIC, *The Yongzhou Salt Industry Case* (竞争执法公告2016年14号 湖南盐业股份有限公司永州市分公司垄断行为案), October 26, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201612/P020170301786660393891.doc (in Chinese) (accessed November 15, 2018), 3–4.

86 Ibid., 6.

87 Ibid., 7–8.

88 The SAIC, *The XilinGol League Broadcast Television Case* (竞争执法公告2016年第5号 内蒙古广播电视网络集团有限公司锡林郭勒分公司滥用市场支配地位案), June 7, 2016, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853682023125.doc (in Chinese) (accessed November 15, 2018), 2.

89 Ibid., 3–4.

90 Ibid., 4.

monopoly exploitation in the form of tying. As the AIC described, XilinGol Television forced its customers to purchase a value-added program in addition to the basic cable program.[91] It alleged the harm of consumer choice limitation.[92]

In the *Wuhan Xinxing Pharmaceutical* case, the relevant market was the national market for methyl salicylate as a pharmaceutical ingredient. The AIC of Hubei Province found that Xinxing, the undertaking in question, monopolized that market by obtaining in 2015 the nation-wide exclusive distributorship of the remaining two producers of methyl salicylate in China.[93] The AIC identified an abuse in the form of imposing unreasonable trading conditions within the meaning of first paragraph (5) of Art 17 AML.[94] It described this abuse as follows: In 2014, Xinxing signed, under the pretense of two shell companies, exclusive distribution contracts with the two remaining producers of methyl salicylate, thereby monopolizing the supply market of methyl salicylate;[95] on that basis, Xinxing began to exploit the market by significantly raising the price and by imposing unreasonable trading conditions upon its customers, such as the requirement of submitting deposits and the requirement of granting in reverse exclusive distributorships for the customers' drug products.[96] Based on this description, the AIC alleged three aspects of harm:

- The disruption of competitive orders in both the methyl salicylate supply market and the downstream market of methyl salicylate drug production. According to the AIC, because of Xinxing's self-insertion as an exclusive distributor in the supply market of methyl salicylate, the pre-existing competition between the two producers of methyl salicylate was eliminated. Moreover, by holding the power to input-foreclose disobedient customers, Xinxing distorted the competition for product quality among its customers (namely methyl salicylate drug producers) and made them compete only for inputs;
- The increased burdening of methyl salicylate drug producers, as a result of Xinxing's exploitative price-increase and unreasonable trading-condition imposition;
- The impairment of consumer interests, in the sense that Xinxing's monopoly exploitation would eventually be transferred to end-consumers in the form of increased prices.[97]

By looking at the AIC's description of the abuse and the allegations of harm, one could say that there were more abuses in this case besides the imposition of unreasonable trading

91 Ibid., 6.

92 Ibid., 8.

93 The SAIC, *The Wuhan Xinxing Pharmaceutical Case* (竞争执法公告2017年4号 武汉新兴精英医药有限公司滥用市场支配地位案), January 11, 2017, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201702/P020170301716224640210.pdf (in Chinese) (accessed November 15, 2018), 3–4.

94 Ibid., 18.

95 Ibid., 6–7.

96 Ibid., 8–9.

97 Ibid., 10–11.

conditions, including the monopolization of the supply market by way of deception, and exploitative price-increase. In that sense, one could argue that the AIC's allegations of harm against the tying in question were to a certain extent misplaced.

In the *Sichuan Jiuyuan Yinhai Software* case, the AIC of Sichuan Province found the undertaking in question, Yinhai, to be a monopoly in the relevant market for health-insurance payment software within the geographic scope of Guangyuan Municipality.[98] This monopoly was mostly the creation of state intervention, in the sense that a software company must be selected through a tendering process to be qualified for developing this kind of payment software.[99] On that basis, the AIC identified an abuse in the form of tying. The tying product was health-insurance payment software, and the tied products were encryption keyboards and card readers.[100] When examining the tying conduct in question, the AIC followed the typical route for establishing abusive tying: It found Yinhai to be a monopoly in the tying product market. It also found that the tying and tied products were separate, and that customers were unjustifiably forced to purchase the ties.[101] When it came to the fourth step of verifying the anticompetitiveness of the tying, the AIC made three allegations of harm:

- The exclusion of competitors in the tied product markets,
- The limitation on customer choice, and
- The exploitation of monopoly profits.[102]

However, a closer look at those three allegations would reveal that the first allegation was completely unsubstantiated, in the sense that there was no mentioning, let alone assessment, of the competitive situation in the tied product markets throughout the decision. Therefore, the AIC's theory of harm was actually revolving around the exploitative damages done to customers (in forms of limited choice and unfair price), as opposed to the exclusionary harm to competitors (in the tied product market). It is possible that the AIC used customer choice limitation as a proxy concern for competition foreclosure in the tied product markets, but that speculation cannot be verified due to the AIC's limited analysis.

2.3.4 Wu Xiaoqin v Shaanxi Broadcast

This was a private enforcement case closed in 2016. The plaintiff was a natural person named Wu Xiaoqin. The defendant was Shaanxi Broadcast & TV Network Intermediary Company ("Shaanxi Broadcast"), a provider of cable television transmission service within the Province of Shanxi. As a cable-TV customer, the plaintiff accused the defendant of dominance abuse

98 The SAIC, *The Sichuan Jiuyuan Yinhai Software Case* (竞争执法公告2017年12号 四川久远银海畅辉软件有限公司滥用市场支配地位案), August 3, 2017, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201708/W020170821611800336982.doc (in Chinese) (accessed November 15, 2018), 6–7.

99 Ibid., 7–8.

100 Ibid., 3.

101 Ibid., 8.

102 Ibid., 9.

by tying. The tying product was "the supply of basic television program package", and the tied product was "the supply of pay television program package".

The plaintiff initially filed the suit before the Xi'an Intermediary Court of Shanxi Province, which found the tying abusive and ruled in favor of the plaintiff. The defendant then appealed to the Shanxi High Court. On September 12, 2013, the High Court reversed the first instance judgment and ruled in total favor of the defendant.[103] To challenge this appeal judgment, the plaintiff filed a request for retrial before the Supreme Court. The Supreme Court retried this case and delivered the final judgment on May 30, 2016. It quashed the appeal judgment and upheld the first instance judgment.[104]

2.3.4.1 The Assessments of the Three Courts

The First Instance Judgment

The first instance judgment was similar to the abovementioned AIC decisions on abusive tying. The Xi'an Intermediary Court defined the relevant market as the market for cable television transmission service within the Province of Shanxi. It found the defendant to be a monopoly in that market, because that market was characterized with state-imposed high barriers to entry and large sunk costs. Subsequently, the Intermediary Court found the two products in question, namely "basic television program package" and "pay television program package", to be two separate products. It also found that the defendant *coercively* sold the tie to the plaintiff, in the sense that the defendant did not inform the plaintiff the possibility of choosing only the "basic television program package". Since the defendant did not provide any justification for this conduct, the Intermediary Court found it to be an abuse of dominance within the meaning of first paragraph (5) of Art 17 AML.

The Appeal Judgment That Made Two Logical Mistakes

In the appeal, the Shanxi High Court upheld the Intermediary Court's finding of dominance. However, during the appeal proceeding, the defendant submitted a new piece of evidence,

103 The Shanxi High People's Court, *Wu Xiaoqin v Shaanxi Broadcast (appeal)* (陕西广电网络传媒（集团）股份有限公司与吴小秦捆绑交易纠纷判决书 [2013]陕民三终字第00038号), September 12, 2013, http://wenshu.court.gov.cn/content/content?DocID=af384e3a-a443-4e31-a3cd-d1068868d036 (in Chinese) (accessed November 15, 2018) (hereinafter, "the Shanxi High Court judgment on *Wu Xiaoqin v Shaanxi Broadcast*"). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references are needed, this chapter directly quotes the relevant sentences in the judgment.

104 The Supreme People's Court, *Wu Xiaoqin v Shaanxi Broadcast (retrial)* (吴小秦与陕西广电网络传媒（集团）股份有限公司捆绑交易纠纷申请再审民事判决书 [2016] 最高法民再98号), May 30, 2016, http://wenshu.court.gov.cn/content/content?DocID=2a673a72-5b62-4857-ae42-c8b835b0c096 (in Chinese) (accessed November 15, 2018) (hereinafter, "the Supreme Court judgment on *Wu Xiaoqin v Shaanxi Broadcast*"). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references are needed, this chapter directly quotes the relevant sentences in the judgment.

which indicated that, around the time of the plaintiff's purchase, the defendant had been offering stand-alone sales of the tying product to non-particular customers.[105] Relying on this fact alone, the High Court concluded that there had been a choice (of purchasing the tying product alone) available to customers, and therefore there was no tying.

There was an obvious mistake in the High Court's reasoning: the fact that the defendant offered untied options to non-particular customers does not necessarily mean that option was extended to the plaintiff. Supposedly, in the event that the plaintiff claimed no such extension, the High Court should have conducted a further inquisition and let the burden of proving that extension shift to the defendant. Therefore, the High Court's reasoning was flawed for assuming, without any verification, that an option was available to the plaintiff.

Subsequently, the High Court made a more serious mistake. Namely, after finding no tying, the High Court made the following statement: in the event that the defendant had not faithfully informed the plaintiff the possible choice, the infringed legal interest would have been the plaintiff's right to information under consumer protection laws; therefore the plaintiff should have claimed protection under consumer laws or contract laws, instead of the AML.

This statement was obviously wrong: by neutralizing the fact of "the defendant's concealing the possible choice from the plaintiff" from the case circumstances, the High Court failed to see that this concealment was a way to implement the coercive tying. In that sense, there might be a concurrence of consumer protection laws and the AML, but that should not exclude the applicability of the latter.

The Supreme Court's Reversal of the Appeal Judgment

In the retrial, the Supreme Court reversed the appeal judgment and upheld the first instance judgment. First, it rejected the credibility of the piece of evidence submitted by the defendant during the appeal, on the ground that this piece of evidence was produced after the litigation and contradicted other case facts without due explanations.[106] On that basis, the Supreme Court corrected the first mistake made by the Shanxi High Court.[107] It also corrected the second mistake in the High Court's statement regarding the inapplicability of the AML, although it did not explicitly point out the logical mistake in that statement.[108]

105 The Shanxi High Court judgment on *Wu Xiaoqin v Shaanxi Broadcast* ("但根据二审查明的事实, 在吴小秦购买服务的前后时间, 广电网络也曾向不特定对象提供过每月25元的基本收费服务。").

106 The Supreme Court judgment on *Wu Xiaoqin v Shaanxi Broadcast* ("在本院诉讼过程中, 广电网络并未对客户服务中心说明的套餐之外的例外情形作出合理解释, 其向本院提交的单独收取相关费用的票据亦发生在本案诉讼之后, 不足以证明诉讼时的情形, 本院对此不予采信。").

107 Ibid. ("二审法院认定广电网络不仅提供了组合服务, 也提供了基本服务, 证据不足, 本院予以纠正。").

108 Ibid. ("二审法院在不能证明是否有选择权的情况下直接认为本案属于未告知消费者有选择权而涉及侵犯消费者知情权的问题，进而在此基础上，认定为广电网络的销售行为未构成反垄断法所规制的没有正当理由的搭售，事实和法律依据不足，本院予以纠正。").

The Harm of Monopoly Exploitation in the Form of Consumer Choice Limitation

Although the three judgments had disputes in the findings of fact, they had a consensus on the harm at hand. Namely, both the High Court and the Supreme Court agreed that the conduct in question, if found abusive, would entail the harm of consumer choice limitation. This was exemplified by these two Courts' consistent focuses on examining whether a choice for the consumers had existed. According to the two courts' statements, they construed the harm of consumer choice limitation in two folds:

- Consumer choice limitation as a stand-alone harm that suggests monopoly exploitation, and
- Consumer choice limitation as a proxy for the harm of competition foreclosure.[109]

In light of the case circumstances, particularly the fact that the defendant was a sustained legal monopoly in providing both the tying product and the tied product, one could say that the two Courts were leaning towards the first fold of harm conception.

2.4 Exclusive Dealing

2.4.1 The *Tetra Pak* Decision

As mentioned in Section 2.3.2, there were three types of abusive conduct identified in the Tetra Pak decision by the SAIC. The second conduct in question was exclusive dealing: Tetra Pak, as a dominant paper-based aseptic packaging material producer, was accused of imposing exclusive dealing obligations on Hong Ta, its upstream raw paper material supplier; Tetra Pak was Hong Ta's only customer.[110] The SAIC considered this conduct to have violated first paragraph (4) of Art 17 AML, which reads that dominant undertakings are prohibited from "without justifiable reasons, allowing their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them".

2.4.1.1 The SAIC's Theory of Harm

The Harm of Competition Foreclosure through Input

As observed by the SAIC, Tetra Pak's exclusive dealing requirements took the cover of technological information confidentiality. Namely, Tetra Pak restricted Hong Ta from supplying other customers by contractually prohibiting Hong Ta from using information related to Tetra Pak's product parameters for purposes other than supplying Tetra Pak.[111]

109 The Shanxi High Court judgment on *Wu Xiaoqin v Shaanxi Broadcast* ("搭售的不法性表现在消费者不同时购买被搭售产品就无法取得搭售产品，如果加上支配地位的条件，意味着消费者除了接受经营者提供的组合销售外，别无选择，违反了消费者的购买意愿；而且凭借剥夺购买人自由选择的权利来排除竞争，具有反竞争性；因此，立法才会予以禁止。"); the Supreme Court judgment on *Wu Xiaoqin v Shaanxi Broadcast* ("将数字电视基本收视维护费和数字电视付费节目费一起收取，客观上影响消费者选择其他服务提供者提供相关数字付费节目，同时也不利于其他服务提供者进入此电视服务市场，对市场竞争具有不利的效果。").

110 The SAIC decision on *Tetra Pak* (note 41 above), 28–30.

111 Ibid., 29–30.

The SAIC found that such restricted information included many technological parameters that were in fact publicly accessible. It also found that, when being prohibited from using such information, the quality of the raw paper material produced would be seriously undermined. Consequently, the possibility for Hong Ta to supply other customers was effectively eliminated.[112]

The alleged harm was competition restriction in the aseptic packaging material market through input-foreclosure. The SAIC's brief theory of harm consisted of the following aspects of consideration.

First of all, it considered the possibility of alternative supplies. In the SAIC's opinion, there were no alternative raw-material suppliers for Tetra Pak's competitors, because of the heavy sunk costs and the lack of consistently large demand.[113] Therefore, the competitors of Tetra Pak were starved of input. The SAIC considered this aspect only in a theoretical context.[114]

Subsequently, the SAIC examined whether the information restriction was justified. In that regard, it found that the parameters of raw paper material production came mainly from the technologies and knowledge possessed by the producers themselves, as opposed to information provided by the customers. Therefore, Hong Ta was in fact able to supply other customers without compromising any confidential information possessed by Tetra Pak.[115] The SAIC also found that many pieces of the restricted information were in fact publicly available. Therefore, Tetra Pak was not justified for restricting Hong Ta's usage of such information.

Lastly, the SAIC emphasized the crucial link between adopting such publicly available information and the production of qualified raw paper materials.[116] In the SAIC's opinion, by interrupting that link, Tetra Pak effectively eliminated the possibility for Hong Ta to supply other customers; this was enough evidence of competition restriction. In line with that logic, the SAIC also envisaged the long-term impairment of the packaging material industry by this conduct.[117]

112 Ibid., 30.

113 Ibid., 31.

114 Yan, "Whither Antitrust Regulation of Loyalty Rebates in China," 628 ("the SAIC did not assess how those competitors were starved by the lack of supply and therefore market competition was impeded, nor did it conduct a counterfactual analysis on why there could be no alternative supplies").

115 The SAIC decision on *Tetra Pak*, 31–32.

116 Ibid., 33.

117 Ibid., 33–34.

2.5 Restrictive Dealing

The wording of first paragraph (4) of Art 17 describes two possible scenarios regarding the offense of "restrictive dealing": (1) imposing the unjustifiable requirement of *dealing exclusively with* the dominant undertaking itself, and (2) imposing the unjustifiable requirement of *dealing with undertakings designated by* the dominant undertaking.

A closer look at these two scenarios would suggest that they actually refer to two separate types of conduct, for they have different underlying rationales. The first one implies the concern for input- or output-foreclosure of competition, as exemplified in *Tetra Pak*. This type of conduct could be described as "exclusive dealing". Meanwhile, the second one entails the risk of leveraging market power from the dominated market to other markets, upon presupposing two facts: (1) the product that is to be dealt with a designated undertaking is different from the one supplied by the dominant undertaking, and (2) that designated undertaking is vertically integrated or has affiliated interests with the dominant undertaking. The AML provision does not specify these presuppositions, but they are shown in the enforcement decisions as introduced below. In that light, one could say that the type of conduct referred to under the characterization of "restrictive dealing" is actually tying.

2.5.1 The *Ürümqi Water Supply* Decision

This was a case handled by the AIC of Xinjiang Uygur Autonomous Region in 2016. The accused undertaking was Ürümqi Water, a water supplier in the Ürümqi Municipality. The AIC defined the relevant market as the market for municipal water supply in Ürümqi, and found Ürümqi Water to be a legal monopoly in that market for providing the public service of water supply.[118]

2.5.1.1 The AIC's Theory of Harm

The Tying Rationale underneath the Restrictive Dealing Characterization

The AIC found that, from 2011 to 2014 when laying down water supply infrastructure for customers, Ürümqi Water required its customers to purchase, via its subsidiary company, water meters produced by a particular manufacturer.[119] It characterized this conduct in question as restrictive dealing within the meaning of first paragraph (4) of Art 17 AML.[120]

Ürümqi Water attempted to defend itself by claiming, among others, that this requirement was to ensure the quality standard of water meters. The AIC dismissed this claim, stating that

118 The SAIC, *The Ürümqi Water Supply Case* (竞争执法公告2016年11号乌鲁木齐水业集团有限公司滥用市场支配地位限定交易案), October 12, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201612/P020170301799074360242.doc (in Chinese) (accessed November 15, 2018), 3–5.

119 Ibid., 2, 6–13 ("乌鲁木齐水业集团有限公司在新、改、扩建供水接装业务过程中, 要求用户单位必须选用其确定的厂家的水表, 必须与其下属子公司签订水表采购合同,否则不予向用户通水").

120 Ibid., 24–25.

Ürümqi Water could not override the authority of national quality standards concerning water meters.[121] It eventually found the conduct in question to be unjustified.

The AIC alleged two aspects of harm:

- The exclusion of competitors in the sales market for water meters and the market for water-supply infrastructure construction;[122]
- The limitation on customers' freedom of choice.[123]

These two aspects of harm indicate a tying rationale, in the sense that they essentially refer to the leveraging of monopoly market power (in the water supply market) to two tied product markets (the sales market for water meters and the market for infrastructure construction) at the expense of customers' freedom of choice. Nonetheless, throughout this decision, the AIC did not perform any examination on those two tied product markets. In fact, the AIC did not even expressly identify the second tie, namely the tying of infrastructure construction with water supply. In that light, one could say that the AIC's theory of harm was incomplete. Arguably, the characterization of the conduct in question as "restrictive dealing" instead of "tying" was responsible for that incompletion, since the very conception of "restrictive dealing" does not appear to have an independent rationale.

2.5.2 The *Suqian Yinkong Water Supply* Decision

This was a case handled by the AIC of Jiangsu Province in 2016. The accused undertaking was Yinkong Water Supply ("Yinkong"). The AIC defined the relevant market as the market for municipal water supply within several districts of the Suqian Municipality.[124] It found Yinkong to be a legal monopoly in that market, because water supply is a service of public nature.[125]

2.5.2.1 The AIC's Theory of Harm

The conduct in question was that, after establishing a subsidiary company that provided water pipeline construction services, Yinkong required its customers, who were real-estate developers, to contract with that subsidiary for pipeline constructions.[126] The AIC found that requirement to have no legal basis and coercive upon the customers.[127] The AIC alleged two aspects of harm:

121 Ibid., 13–14.

122 Ibid., 17.

123 Ibid., 18.

124 The SAIC, *The Suqian Yinkong Water Supply Case* (竞争执法公告2016年13号 宿迁银控自来水有限公司垄断行为案), November 28, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201612/P020170301787883113141.doc (in Chinese) (accessed November 15, 2018), 4.

125 Ibid., 5.

126 Ibid., 7.

127 Ibid., 12–14.

- The restriction of competition in the service market for water pipeline construction;
- The limitation on customer choice.[128]

The same allegations of harm could also be made, had the conduct in question been characterized as tying. The only difference would be that for a tying practice, there is a well-developed theory of harm template (the four cumulative conditions for finding an abusive tying as described in Sections 2.3.1 and 2.3.2). Therefore, by characterizing the conduct in question as restrictive dealing instead of tying, the AIC in this case relieved itself the burden of substantiating those allegations with further analysis.

2.5.3 The *Suqian Kunlun Natural Gas* Decision

This was another case handled by the Jiangsu AIC in 2016. The accused undertaking was Kunlun, a natural gas supplier in the Municipality of Suqian. The AIC defined the relevant market as the market for natural gas supply in Suqian. It found Kunlun a monopoly in that market, because Kunlun was granted an exclusive supply qualification.[129]

The conduct in question was that, when contracting with real-estate developers for gas supply, Kunlun required those potential customers to also contract with it for the construction of gas pipelines, and to purchase from it pipeline materials.[130] The AIC alleged two aspects of harm:

- The restriction of competition in the market for pipeline construction and the market for pipeline material supply;
- The limitation on customer choice.[131]

According to the AIC's description of the conduct and the allegations of harm, this conduct could alternatively be characterized as tying. Therefore this case had the same problem as the ones in the other two cases in this subsection: the AICs were using the "restrictive dealing" rationale as a shortcut for finding abusive tying, therefore saving themselves the trouble of examining the competitive effects, which would be required under the four-condition tying rationale.

128 Ibid., 15–16.

129 The SAIC, *The Suqian Kunlun Natural Gas Case* (竞争执法公告2017年10号 宿迁中石油昆仑燃气有限公司滥用市场支配地位案), December 30, 2016, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201704/P020170412845208790847.doc (in Chinese) (accessed November 15, 2018), 3–4.

130 Ibid., 5–6.

131 Ibid., 11–12.

2.6 Loyalty Rebates

2.6.1 The *Tetra Pak* Decision

So far, *Tetra Pak* is the only AML case concerning loyalty rebates. In this decision, the SAIC introduced the concept of loyalty rebates into the AML framework. It did so by invoking the catchall provision—first paragraph (7) of Art 17 AML, which reads that dominant undertakings are prohibited from committing "other acts of abuse of dominant market positions confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council".[132]

2.6.1.1 The SAIC's Theory of Harm

An Effects-Based Analytical Framework but with Limited Effects-Analysis

The SAIC found abusive two types of loyalty rebates implemented by Tetra Pak in the product market for paper-based aseptic packaging materials.[133] It characterized these two rebate schemes as the following:

(1) Retroactively cumulative rebates, which contained two subcategories: single retroactively cumulative rebates and compound retroactively cumulative rebates;
(2) Individualized target rebates.[134]

The SAIC alleged the harm of *competition restriction* in the packaging material market.[135] Its analysis of these rebate schemes was three-fold:[136]

- Introducing the inherent "loyalty-inducing effects" of the two types of loyalty rebates in question, in the sense that customers were strongly motivated to buy as much as possible from Tetra Pak, because of the zero or negative price of a marginal unit;[137]
- Explaining how, under particular market circumstances, those loyalty-inducing effects could become anticompetitive with the leveraging of market power from the non-contestable share of demand to the contestable share of demand;[138] The particular market circumstances considered by the SAIC included three factors that reinforced the non-contestable share of demand: Tetra Pak's production capacity and product variety, the practice of tying, and the side-implementation

132 The SAIC decision on *Tetra Pak*, 46.
133 Ibid., 34–36.
134 This subsection is written on the basis of a previous article by the author. It refers to that article when relevant points are being cited, and it follows that article's translation of the legal concepts in the *Tetra Pak* decision. For that article, see Yan, "Whither Antitrust Regulation of Loyalty Rebates in China."
135 The SAIC decision on *Tetra Pak*, 45.
136 Yan, "Whither Antitrust Regulation of Loyalty Rebates in China," 624.
137 The SAIC decision on *Tetra Pak*, 37–38.
138 Ibid., 39–40.

of non-abusive discounts.[139]

- Verifying the envisaged anticompetitive effects in the defined market.[140] Nonetheless, the SAIC's attempted verification did not go beyond the theoretical extent.[141]

In light of the above, it could be said that the SAIC's analytical approach to loyalty rebates was effects-oriented, despite that it failed to carry out a full-fledged circumstantial examination on effects.[142]

2.7 Discriminatory Treatment

This category refers to abuses described in first paragraph (6) of Art 17 AML. That provision states that dominant undertakings are prohibited from "without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing".

2.7.1 The *Jiangsu Pizhou Tobacco* Decision

This case was handled by the AIC of Jiangsu Province in 2014. The undertaking in question was the Pizhou Branch of Xuzhou Tobacco in Jiangsu Province ("Pizhou Tobacco"), a state-owned enterprise and a legal monopoly on tobacco wholesales in the city of Pizhou. On that account, the AIC defined the relevant market as the wholesales of tobacco in Pizhou and established Pizhou Tobacco's dominance in that market.[143]

The AIC also found that, pursuant to the special rules governing the tobacco trade, the retailers were categorized into different groups subject to different supply policies.[144] Large-scale retailers were put into the "KA customers" group. There were two sets of customers belonging to that group: three branch stores of Jinying, and two branch stores of Huanlemai.[145]

2.7.1.1 The AIC's Theory of Harm

The Harm of Downstream Competition Disruption

The abusive conduct was Pizhou Tobacco's discriminatory treatment of these two sets of KA customers. According to the AIC's findings, Pizhou Tobacco gave preferential treatment

139 Ibid., 40–41.

140 Ibid., 44–45.

141 Yan, "Whither Antitrust Regulation of Loyalty Rebates in China," 626–27.

142 Ibid., 625, 627.

143 The SAIC, *The Jiangsu Pizhou Tobacco Case* (竞争执法公告2014年第18号 江苏徐州市烟草公司邳州分公司滥用市场支配地位案), September 2014, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853625149696.doc (in Chinese) (accessed November 15, 2018), 2–3.

144 Ibid., 4.

145 Ibid., 4–5.

to Jinying in terms of (1) the numbers of order that could be placed each week, and (2) the amount of high-demand cigarettes that could be purchased in each order placement.[146] The AIC found this discriminatory treatment to be unjustified, because Jinying and Huanlemai were equal-footing customers, as evidenced by the fact that they were categorized into the same group.[147] Moreover, it noted the difference between the discriminatory treatment between different groups of customers and the discriminatory treatment of customers within the same group: the former was justifiable under the special rules governing tobacco trade, whereas the latter had no legal basis.[148] Mostly importantly, it found that Jinying was affiliated to and controlled by Pizhou Tobacco.[149] Based on these findings, the AIC alleged the harm of competition disruption at the retail level.[150]

2.7.2 The *Hubei Yinxingtuo Harbor* Decision

This case was handled by the AIC of Hubei Province in 2018. The conduct in question was discriminatory treatment within the meaning of first paragraph (6) of Art 17 AML.[151]

The undertaking in question was Hubei Yinxingtuo Company ("Yinxingtuo"), which operated the Yinxingtuo Harbor. It provided the service of arranging upriver roll-on/roll-off transportations for trucks in that harbor. The Hubei AIC defined that service market as the relevant market, and found Yinxingtuo to be a legal monopoly in that market.[152] Basically, Yinxingtuo operated as an intermediary between truck companies (the customers) and the roll-on/roll-off shipping companies (the transportation providers).

2.7.2.1 The AIC's Theory of Harm

The Harm of Secondary-Line Competition Restriction

The Hubei AIC described the discriminatory treatment in question from two aspects:

(1) Prioritizing the ship loading that belonged to one particular shipping company—Company H.[153] The AIC found that Company H and Yinxingtuo were interest-affiliated.[154]

(2) Assigning to Company H truck-transportations that were relatively more lucrative.[155]

146 Ibid., 6.

147 Ibid., 9.

148 Ibid., 7–8.

149 Ibid., 10.

150 Ibid., 11.

151 The SAIC, *The Hubei Yinxingtuo Harbor Case* (竞争执法公告2018年第5号湖北银杏沱港埠股份有限公司差别待遇案行政处罚决定书), January 9, 2018, http://home.saic.gov.cn/fw/bsdt/gg/jzzf/201802/P020180208519209282238.pdf (in Chinese) (accessed November 15, 2018), 18.

152 Ibid., 7–8.

153 Ibid., 3–5.

154 Ibid., 17–18.

155 Ibid., 5–7.

The AIC alleged two sets of harm. The first one was the *disruption of competition among the shipping companies*. To verify that harm, the AIC presented documentary evidence of past administrative sanctions and reconciliations concerning this discriminatory practice.[156] According to the AIC, those documents showed that the conduct in question was so habitual and blatantly unfair that physical conflicts were caused and governmental interventions had to be taken; therefore they indicated the existence of secondary-line competitive injury, namely the disadvantaging of shipping companies that were competing with Company H. The AIC supplemented those documents with its own investigation involving random retrievals of each month's dispatch records. That investigation suggested that Company H had been consistently favored.[157]

The second harm was the *impairment of the truck companies' benefits*. The AIC briefly mentioned that, because of Yinxingtuo's preferential patronage of Company H, often times the truck companies would have to wait unnecessarily for a shipping service.[158] In that sense, this harm consideration was just the harm of secondary-line competition restriction described from a different perspective.

2.7.3 The *Chifeng Salt Industry* Decision

This was a case handled by the Inner Mongolian AIC in 2016. The accused undertaking was Chifeng Salt, a state-owned enterprise of salt distribution in Chifeng Municipality. The AIC noted that the wholesaling of salt was under an exclusive-licensing system at the time of the conduct, and thus defined the relevant market as the wholesale market for edible salt within the Chifeng Municipality.[159] On that basis, it found Chifeng Salt to be a legal monopoly in that market.[160]

2.7.3.1 The AIC's Theory of Harm

Consumer Choice Limitation and the Disruption of Competition in Neighboring Markets

The AIC described the conduct in question as follows. In September 2014, when the market demand for salt was seasonably high, Chifeng Salt implemented a discriminatory treatment scheme. According to that scheme, Chifeng Salt classified its customers (downstream retailors) into two categories: those located in counties adjoining other provinces, and those in counties not adjoining other provinces; it refused to supply to the latter certain types of salt that were available to the former.[161]

156 Ibid., 8–9.

157 Ibid., 10.

158 Ibid.

159 The SAIC, *The Chifeng Salt Industry Case* (竞争执法公告2016年第7号 内蒙古赤峰市盐业公司滥用市场支配地位行为处罚决定), August 16, 2016, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853684982025.doc (in Chinese) (accessed November 15, 2018), 3–4.

160 Ibid., 5.

161 Ibid., 6.

To defend itself, Chifeng Salt claimed, among other factual reasons for the discrimination, its freedom of selective trading as an independent undertaking.[162] The AIC dismissed Chifeng Salt's defense, after finding that the factual reasons it claimed to be untrue.[163] It also held that Chifeng Salt's freedom of selective trading should be understood as the right to selectively wholesale the types of salt that had no mandatory supply requirement imposed by the government, instead of the right to select its trading parties.[164] The AIC did not provide further explanations as to why Chifeng Salt would discriminate between those two categories of retailers.

The AIC alleged two aspects of harm:

- The *infringement of consumer rights*, in the sense that Chifeng Salt deprived the consumers in the second category the choice of low-price salt, and therefore violating the obligations attached to the legally granted monopoly.
- The *disruption of the upstream and downstream competitive orders*. First, according to the AIC, this discriminatory treatment would send the wrong signals to upstream salt producers regarding the market demand, thus misdirecting the production. Secondly, it would disadvantage retailers in the second category in comparison with retailers in the first category.[165]

2.8 Refusal to Deal

This conduct category refers to abuses of dominance described in the first paragraph (3) of Art 17 AML.

2.8.1 The *Chongqing Qingyang Pharmaceutical* Decision

This was a case handled by the AIC of the Chongqing Municipality in 2015. The accused undertaking was Chongqing Qingyang Pharmaceutical ("Qingyang"). The AIC defined the relevant market as the national market for allopurinol as a pharmaceutical ingredient, after considering the substitutability from both the supply side and the demand side.[166] In that regard, it noted the difference between allopurinol *as a pharmaceutical ingredient*, which is used only for further processing, and allopurinol *as a finished drug product*, which is used for clinical purposes.[167] The conduct in question was Qingyang's refusal to supply (ingredient) allopurinol to its customers from October 2013 till March 2014.[168]

162 Ibid., 7.

163 Ibid., 8–9.

164 Ibid., 7–8.

165 Ibid., 10–11.

166 The SAIC, *The Chongqing Qingyang Pharmaceutical Case* (竞争执法公告2015年第12号 重庆青阳药业有限公司涉嫌滥用市场支配地位拒绝交易案), October 28, 2015, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853653342966.doc (in Chinese) (accessed November 15, 2018), 5–6.

167 Ibid., 3–4.

168 Ibid., 10.

2.8.1.1 The AIC's Theory of Harm

Competition Foreclosure as the Core Harm

First, the AIC found Qingyang to be a monopoly in the relevant market. In that regard, it noted that, due to the high quality requirement for pharmaceutical ingredients production imposed by the state,[169] historically there had only been six undertakings being granted the license to produce allopurinol. It also noted that, among the other five undertakings, four had their licenses expired before January 2012; meanwhile, the remaining one had a valid license but never launched any production. Therefore, from June 2012 till the time of the decision, Qingyang was the only producer of allopurinol.[170] The AIC found confirmation of this monopoly status in Qingyang's monopolistic behavior records, including the unilateral price increase in 2013[171] and the refusal to supply in question.[172]

The case background was that, besides producing allopurinol as an ingredient for finished drug production, Qingyang also produced allopurinol as a finished drug product, and it signed a distributor for its allopurinol drug product in September 2013.[173]

In that light, the AIC held that the refusal (to supply allopurinol as an ingredient) was motivated solely to input-foreclose Qingyang's competitors in the market for allopurinol as a finished drug product, and to ultimately monopolize that market.[174] Qingyang attempted to cover up the refusal by signing an exclusive supply (of allopurinol as an ingredient) contract with that same distributor and therefore shielding behind the contractual obligations,[175] but the AIC considered that exclusive-supply contract to be just a pretext for the input-foreclosure.[176]

Eventually, the AIC alleged three aspects of harm:

- The *disruption of the competitive order in the downstream market* (for allopurinol as a finished drug product). In this regard, the AIC pointed to the fact that certain drug producers had been forced out of the market because of ingredient shortage, and the fact that the price of allopurinol as an ingredient had more than doubled.[177]
- The *production capacity loss* of the allopurinol drug production industry. The AIC alleged this harm on the basis that certain allopurinol drug producers were forced out of the market.[178]

169 Ibid., 8.
170 Ibid., 7.
171 Ibid.
172 Ibid., 9.
173 Ibid.
174 Ibid., 10–11.
175 Ibid., 12.
176 Ibid., 13.
177 Ibid.
178 Ibid., 14.

- The *burdening of consumers*. In this regard, the AIC considered that the price increase of allopurinol ingredient (resulted from the supply shortage) was eventually borne by end-consumers, as evidenced by the fact that the market price for allopurinol pills increased from 5.5 CNY to 25 CNY per bottle.[179]

Judging by the three allegations, it is clear that the AIC was concerned about the foreclosure of competition. In that sense, the second and third allegations can be understood as the AIC's further explanations of the anticompetitive effects from the perspectives of the industry and the consumers.

2.8.2 The Chongqing Southwest No.2 Pharmaceutical Decision

Closed in 2016, this was the second refusal to supply case handled by the Chongqing AIC. The accused undertaking was Chongqing Southwest No.2 Pharmaceutical ("Southwest Pharmaceutical"). The AIC defined the relevant market as the national market for phenol as a pharmaceutical ingredient.[180] It found this market to have high entry barriers because of the health regulations, and that Southwest Pharmaceutical was a sustained monopoly in that market, as evidenced by its significant price-increase in 2014 without any sale loss.[181] The AIC also observed that, the customers buying phenol as a pharmaceutical ingredient were mostly hospitals and drug manufacturers for the purpose of producing a type of over-the-counter phenol drug.[182]

2.8.2.1 The AIC's Theory of Harm

The Core Harm of Foreclosure and Two Possibly Unidentified Abuses

The conduct in question was that, after signing an exclusive contract with a distributor in February 2014, Southwest Pharmaceutical refused to supply phenol to any of its old customers from February 2014 to April 2014, and from May 2014 to December 2015, it supplied only to six new customers while continuing refusing all of its old customers.[183] Southwest Pharmaceutical raised three objective justifications for that conduct, but the AIC found them all to be factually incorrect.[184]

The AIC also found that, the reason that Southwest Pharmaceutical signed an exclusive distribution contract was because that distributor promised to bring in a purchaser

179 Ibid.

180 The SAIC, *The Chongqing Southwest No.2 Pharmaceutical Case* (竞争执法公告2016年12号 重庆西南制药二厂有限责任公司垄断行为案), November 24, 2016, http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/P020170309853692109960.doc (in Chinese) (accessed November 15, 2018), 7.

181 Ibid., 8–10.

182 Ibid., 5–6.

183 Ibid., 11–12.

184 Ibid., 12–15.

for gastrodin produced by Southwest Pharmaceutical.[185] In other words, the exclusive distribution contract was Southwest Pharmaceutical's strategy of sharing the monopoly profits in the phenol market with a downstream distributor so as to simultaneously promote its sales of another product, gastrodin. The AIC found confirmation of this monopoly exploitation strategy in the wording of the exclusive distribution contract.[186]

This exclusive distribution contract essentially meant that an additional chain was to be added to the pre-existing supply-demand relationship between Southwest Pharmaceutical (the producer of ingredient phenol) and its customers (the producers of the over-the-counter phenol drug). Consequently, in order to reap the monopoly profits with this exclusive distributor, the downstream market (for the supply of the over-the-counter phenol drug) would have to be monopolized first. In that light, the refusal to supply in question was just the initial step of that strategy. Namely, the refusal to supply was intended to monopolize the downstream market by draining the customers' existing stocks of phenol.[187] Supposedly after that, Southwest Pharmaceutical would be able to share with the distributor the monopoly exploitation profits while promoting its sales of gastrodin.

The AIC alleged four aspects of harm:

- The *disruption of the competitive order in the downstream market* for the over-the-counter phenol drug production, as those producers were input-foreclosed;
- The *impairment of production capacity of the phenol drug industry*. This could be understood as a further elaboration of the first aspect of harm;
- The *injuring of the customers' interest*. In this aspect, the AIC mentioned that, for those minority customers who were retailers of phenol as an ingredient, they were forced to bear the profit loss when their customers reduced demand because of the price-increase;
- The *exploitation of end-consumers*, in the sense that the exploitative pricing was eventually borne by purchasers of the phenol drug.[188]

The case circumstances were relatively complex compared to the other AIC cases. Based on the AIC's case description, one could say that there were more abuses in this case than a refusal to supply, including (1) the signing of the exclusive distribution contract in exchange for market expansion of another product, and (2) the price-elevation when implementing the refusal after signing the contract. The first one could be characterized as *contractual tying*,[189] and the second one as *exploitative pricing*. It is possible that the AIC's four allegations

185 Ibid., 15–16.

186 Ibid., 17–18.

187 Ibid., 19–21.

188 Ibid., 22–23.

189 Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, 5th ed. (Oxford, United Kingdom; New York, NY: Oxford University Press, 2014), 486.

of harm took into account these two abuses without expressly identifying them. One possible explanation for the AIC's not identifying these two abuses was the jurisdictional delimitation between the SAIC and the NDRC: the SAIC and local AICs were only supposed to handle non-price-related abuses.

2.8.3 The *Zhejiang Second Pharmaceutical & Tianjin Handewei Pharmaceutical* Decision

2.8.3.1 The NDRC's Theory of Harm

This was a case closed by the NDRC in 2017. The two pharmaceutical companies in question were accused of abusing their collective dominant position in the national market for the supply of isoniazid as a pharmaceutical ingredient.[190] The NDRC identified two abuses: excessive pricing and refusal to supply. The first abuse is described in Section 2.2.2.

Regarding the second abuse, the NDRC found that the two undertakings signed an exclusive distribution contract with a third party in 2014; subsequently, they ceased supplying their previous customers. The NDRC found that the exclusive contract was for the purpose of exploitatively raising the price, and that the refusal had no objective justifications. It alleged the harm of *downstream competition distortion* (resulted from the input-foreclosure of customers) and the *impairment of consumer interests* (in the sense of increased prices of drug products due to the reduced number of drug producers).

2.8.4 Observation on the Three Enforcement Decisions: The Curious Exemption of the Exclusive Distributor

In the abovementioned three cases, the enforcement agency found abuse of dominance in the form of refusal to supply, as stipulated in the first paragraph (3) of Art 17 AML. Notably, an exclusive distribution agreement was present in all three cases. In that light, it is discussable whether these cases could be enforced alternatively in the approach of vertical anticompetitive agreements. In other words, there could be a theory of harm for each case under the anticompetitive rationale of exclusive distribution agreements, alternative to the rationale of abusive refusal to supply.

That alternative approach would be desirable for bringing under regulation the exclusive distributors in all three cases. According to the case descriptions, those distributors shared the profits of monopoly exploitation. Under the premise that those exclusive distributors acted upon their own wills, they would be equally responsible for the competition distortion in downstream markets. In that sense, one could argue that the theories of harm in the three cases were questionable, to the extent that they resulted in selective enforcement by overlooking the involvement of exclusive distributors.

190 See note 37 above.

2.8.5 Yunnan Yingding v Sinopec

This was a private enforcement case concerning refusal to deal. The plaintiff was Yingding, a private undertaking producing biological diesel oil and operating in Yunnan Province. The defendant was Sinopec, a state-owned enterprise that produces fossil petro oil and distributes product petro oil. It has a branch company in Yunnan Province. The plaintiff accused the defendant of abusing its dominant position by refusing to purchase the biological diesel oil produced by the plaintiff.

There was a background to this case: in an effort to encourage the production and the consumption of biological fuels, Art 16(3) of the Chinese Renewable Energy Law requires national petrol distributors to include, in accordance with the regulations adopted by the State Council and the respective provincial governments, bio fuels that meet national quality standards into their fuel distribution system. Prior to this Law, those national distributors produced and distributed only fossil fuels.

The plaintiff initially brought this suit before the Kunming Intermediary People's Court of Yunnan Province, which issued the first instance judgment on December 8, 2014. That judgment found abuse of dominance by the defendant but did not award the plaintiff any damages. Both parties appealed to the Yunnan High People's Court, which quashed the first instance judgment and referred the case back to the Kunming Intermediary Court, on the ground of misidentifications of facts. The Kunming Intermediary Court delivered a new judgment on October 8, 2016, this time ruling in favor of the defendant.[191] The plaintiff appealed to the Yunnan High Court, which issued a final judgment on August 28, 2017, upholding wholly the first instance judgment.[192]

191 The Kunming Intermediary People's Court, *Yunnan Yingding v Sinopec (first instance)* (中石化、云南盈鼎反垄断诉讼重审一审判决书 [2015]昆知民重字第3号), October 8, 2016, https://mp.weixin.qq.com/s?__biz=MzA5MTA3ODc1Mw==&mid=2649782164&idx=2&sn=d690b4d987e79b4d6ab75e2dd9681644&chksm=88053e9abf72b78c983587765e9ace395fe71134a448f698006c5d8d3b9722fee683ec015318&mpshare=1&scene=24&srcid=1103906mUwzxJyvukser9LOv#rd (in Chinese) (accessed November 16, 2018) (hereinafter, "the Kunming Intermediary Court judgment on *Yunnan Yingding v Sinopec*"). There was no pagination or numbering of paragraphs in this (unofficial) version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references need to be made, this chapter directly quotes the relevant sentences in the judgment.

192 The Yunnan High People's Court, *Yunnan Yingding v Sinopec (appeal)* (云南盈鼎生物能源股份有限公司、中国石化销售有限公司云南石油分公司拒绝交易纠纷二审民事判决书 [2017]云民终122号), August 28, 2017, http://wenshu.court.gov.cn/content/content?DocID=92ce6152-86f2-44d5-b4dd-a7fe00c710cd (in Chinese) (accessed November 16, 2018). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references need to be made, this chapter directly quotes the relevant sentences in the judgment.

2.8.5.1 The Kunming Intermediary Court's Retrial Assessment

The Intermediary Court's assessment in the retrial revolved around two issues: (1) whether, under Art 16(3) of the Chinese Renewable Energy Law, the defendant had the statutory obligation to purchase the plaintiff's bio diesel oil, and (2) whether the defendant committed abuse of dominance by refusing to purchase.

Finding One Justification for the Refusal

The Intermediary Court found the answer to the first question to be affirmative. However, it noted that, to implement such a statutory obligation, it is prerequisite that the State Council and the provincial governments adopt secondary regulations regarding the specifications of such purchases, such as quotas and prices. It held that, in the absence of such regulations and in pursuit of the principle of fairness, the defendant's contractual freedom should be respected. In other words, the Intermediary Court considered the absence of administrative implementation measures to be a justification for the defendant's refusal to deal.

The Presumption of Buyer-Dominance based on Market Share

Regarding the second issue, the Intermediary Court followed the logical steps of defining the relevant market, establishing dominance, and examining abuse. It defined the relevant market as the distribution market for product petrol oil within the geographic scope of Yunnan Province. It stressed that this was a case concerning abuse of dominance on the buyer's side. In that regard, it stated that, when the usage of bio diesel oil was limited to fueling, the available buyers would be limited to the distributors of product petro oil.[193] This is because those distributors need to blend bio oil proportionally into fossil oil to make it a fuel source. In that sense, the Intermediary Court understood the relevant market alternatively as the purchase market for bio diesel oil.[194]

Subsequently, the Intermediary Court found Sinopec of holding a 50% market share in the relevant market, based on public information and evidence supplied by the plaintiff. According to Art 19 of the AML, it presumed dominance by Sinopec, and since Sinopec did not provide any rebutting evidence, that dominance presumption was confirmed.

Using the Concept of "Deal" in Contract Laws to Interpret the Concept of "Refusal to Deal" in the Anti-Monopoly Law

Lastly, the Intermediary Court examined the alleged abusiveness of the refusal to purchase in question. It started by elaborating the concept of "refusal to deal". The defendant argued that the reason for no deal was because the plaintiff did not send any specific request to

193 The Kunming Intermediary Court judgment on *Yunnan Yingding v Sinopec* ("对地沟油制生物柴油而言，从普遍意义上讲，其性能、用途和可销售的市场具有多样性，但当其被限定作为生物液体燃料使用时，能够购买地沟油制生物柴油的主体，仅只可能是石油成品销售市场中的主体。").

194 It is discussable whether diesel oil should be distinguished from gasoline under the general category of bio oil, but the Intermediary Court did not provide further facts that could host such discussions.

deal or present any conditions for dealing. The Intermediary Court dismissed this argument, finding that there was a request to deal, as evidenced by a legal letter sent from the plaintiff to the defendant. However, it found that such a request to deal contained no specific dealing conditions. Therefore, it held that, from the contract law perspective, that request should be recognized as simply an invitation to offer, instead of an offer; in that event, the defendant was entitled not to respond with an offer to contract, and therefore the defendant's non-responsiveness should fall outside the concept of "refusal to deal" within the meaning of first paragraph (3) of Art 17 AML. In the appeal, the Yunnan High Court upheld this line of reasoning with little reexamination.

Here a question arises. Namely, it is questionable whether the conception of "refusal to deal" in the AML context should be subject to the much stricter conception of "deal" in a contract law context. Arguably, the answer should be negative. This is because an antitrust intervention against a refusal to deal comes inherently with a need to balance between the freedom of contract and the protection of competition. Presumably, the whole point of introducing the contractual notions of "invitation to offer" and "offer" was to emphasize an undertaking's freedom of contract; this point should already be incorporated in the abuse analysis (as one side of the balance). Therefore, one could argue that, by borrowing notions from contract laws to interpret the AML concept of "refusal to deal", the Intermediary Court unduly narrowed that AML concept and neglected the balancing between contractual freedom and competition protection, which is supposed to be inherent in the antitrust assessment of a refusal to deal.

The Circumvented Anticompetitive Assessment

By stating that there was no "deal" to begin with (therefore no refusal), the Intermediary Court refrained from assessing the disputed conduct's impact on competition. As argued above, the Intermediary Court failed to weigh the freedom of contract against the protection of competition. Had it done so, it would have been confronted with the task to assess the output-foreclosure effect.

The Intermediary Court only considered whether the refusal was justified (by the absence of governmental implementation measures). It should have considered at least two other aspects: (1) whether the distribution system withheld by the defendant was indispensable for the plaintiff's output, and (2) whether and how the alleged refusal to purchase had output-foreclosed the plaintiff as a competitor in the bio diesel oil production market. In the second aspect, it would be helpful to discuss Sinopec's potential motives for refusing to purchase.

2.8.6 Gu Fang v China Southern Airlines

In 2013, Gu Fang purchased a ticket for a flight from Mianyang to Guangzhou. China Southern Airlines was the only passenger transporter of that flight. China Southern Airlines cancelled the flight that Gu expected to take prior to the departure. This led to Gu suing China Southern Airlines for abuse of dominance in the form of refusal to deal. This case was first tried by the Guangzhou Intermediary Court, which ruled in favor of the defendant. Gu appealed to the Guangdong High Court. On May 5, 2015, the High Court delivered the final judgment, upholding the first instance judgment.[195]

2.8.6.1 The Guangdong High Court's Assessment

Two Possible Types of Harm behind a Refusal to Deal

The High Court defined the relevant market as the combination of two airlines: the one from Mianyang to Guangzhou and the one from Chengdu to Guangzhou.[196] The second one had multiple operators and multiple flights per day. On that basis, it found no dominance of China Southern Airlines. Therefore it dismissed all of the plaintiff's claims. Nonetheless, the High Court continued assessing the alleged abuse, for the hypothetical situation where China Southern Airlines were dominant. There, the High Court explained its understanding of the anticompetitiveness of a refusal to deal within the meaning of first paragraph (3) of Art 17 AML.

First, it considered the general harm of a refusal to deal by a dominant undertaking to be *competition foreclosure* borne by the refused customer. In that event, it noted that, in this case, the plaintiff as a consumer had no competitive relationship with the defendant. It also noted that, according to the special rules governing the air transportation industry, airline companies are allowed to cancel flights as long as they duly fulfill the transporter responsibilities.

Secondly, it ruled that, in special circumstances, a refusal to deal could also induce the harm of *consumer interest impairment*. The High Court considered this would happen on two cumulative conditions: (1) the product or service withheld by the dominant undertaking has a public nature, and (2) the refused consumer would have a great difficulty in finding alternative provider of such public product/service. According to this formula, the High Court found that the plaintiff was not personally targeted at, as she could still purchase other flights provided by the defendant after the cancellation.

195 The Guangdong High People's Court, *Gu Fang v China Southern Airlines (appeal)* (顾芳与中国南方航空股份有限公司拒绝交易纠纷二审民事判决书 [2014] 粤高法民三终字第1141号), May 5, 2015, http://wenshu.court.gov.cn/content/content?DocID=c23553f7-f57b-4797-9380-c1488b2480fe (in Chinese) (accessed April 21, 2018). There was no pagination in the official online version of this judgment. Therefore, page-precise references to this judgment are omitted here and in subsequent descriptions.

196 Both the city of Mianyang and Chengdu are located in the Sichuan Province. Chengdu is the capital of Sichuan and is less than 150 kilometers away from Mianyang.

2.8.7 Xu Shuqing v Tencent

In this case, Xu Shuqing sued Tencent for abusing its dominant position by refusing to deal. The background to this case was that Tencent developed and operates a multi-purpose messaging and social media app called Wechat. Users of Wechat can purchase or obtain for free stickers (for chatting purpose) on the "sticker platform" installed in that app. Tencent runs that platform by openly accepting submissions from sticker creators and then offering them—for free or by charge—to Wechat users. Xu the plaintiff designed a package of stickers with the purpose of promoting his legal-consultancy business. He submitted this sticker package to the Wechat sticker platform, but was rejected of admission; therefore he sued Tencent for abuse of dominance.

The action was originally brought to the Shenzhen Intermediary Court, which concluded that there was no abuse of dominance. The Intermediary Court's conclusion was based on two grounds: First, Tencent did not have a dominant position in the relevant market, which was defined as the market for "global Internet platform information service". Secondly, the conduct in question was not abusive because the plaintiff and the defendant were not competitors.[197]

2.8.7.1 The Guangdong High Court's Assessment

The Core Harm of Competition Restriction and The Three-Aspect Examination

The plaintiff appealed to the Guangdong High Court, which delivered the final judgment on June 2, 2017. The High Court upheld the Intermediary Court's conclusion, but it corrected the Intermediary Court's reasoning. Particularly, the High Court redefined the relevant market as the Chinese national market for the supply for sticker packages for Internet messaging. On that basis, it found no dominance by Tencent in that market, on the ground that the plaintiff failed to meet the standard of proof.

The High Court also examined the abusiveness of the conduct in question. In that regard, it spotlighted Art 6 of the AML:

> Undertakings holding a dominant position on the market may not abuse such position to eliminate or restrict competition.

In other words, the High Court advanced *competition restriction* as the first and foremost concern when determining the legality of an alleged abuse of dominance. In that light, the High Court briefly examined the conduct in question from the following aspects:

197 The Guangdong High People's Court, *Xu Shuqing v Tencent (appeal)* (徐书青、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷二审民事判决书 [2016] 粤民终1938号), June 2, 2017, http://wenshu.court.gov.cn/content/content?DocID=4b2fedf3-77f0-489f-9716-a85c009bc104 (in Chinese) (accessed November 16, 2018). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case.

- Whether the refusal to grant an admission to the sticker platform had any justifications. In that regard, the High Court took into account the defendant's right to operate business independently, and considered the refusal to be justified by the defendant's publicly disclosed admission rules, which rejected sticker submissions that were aimed at promoting third-party businesses.
- Whether the Wechat sticker platform had been indispensable for the plaintiff to distribute his stickers. In that regard, the High Court observed that there had been many other effective options for the plaintiff to distribute his stickers without any extra costs.
- Whether the refusal had resulted in competition foreclosure borne by the plaintiff. In that regard, the High Court dismissed the plaintiff's claim that the refusal had distorted the competition between him and other Wechat sticker submitters, on the ground that the plaintiff did not provide sufficient evidence to prove that there was such a competitive market. Therefore it concluded that the refusal in question did not result in any competition restriction.

2.9 Resale Price Maintenance

Although enforcement against resale price maintenance ("RPM") is installed in the anticompetitive agreement branch of the AML, in various aspects the anticompetitive assessments of RPM are similar to the assessments of dominance abuse. This is because the examination of market power plays a crucial role in both types of assessments: RPM as a form of vertical agreements has ambiguous effects on competition, when both the inter-brand and the intra-brand dimensions are taken into account in combination with the specific market structures,[198] and therefore, it is necessary to examine, in specific circumstances, the market power of an undertaking in question in relation to both its horizontal competitors and its vertical counterparties.[199]

In that light, this section introduces three cases on RPM. The three cases include one private litigation case, one NDRC case, and one administrative litigation case. As an addition to the selection of abuse of dominance cases, they provide useful insights on the production of theories of harm in the AML enterprise.

2.9.1 Ruibang v Johnson & Johnson

This is the first and the only private enforcement case concerning RPM under the AML in the tripartite era. The defendant was Johnson & Johnson, a multinational company that sells medical apparatus and instruments. The plaintiff was Ruibang, one of the defendant's retailers in selling sutures in Mainland China.

198 Barbora Jedlickova, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law* (Cheltenham, UK: Edward Elgar Publishing, 2016), 46–47.

199 Ibid., 31–33.

The plaintiff and the defendant had an annually renewed agreement, which required the plaintiff not to sell below the minimum resale price specified by the defendant, along with other requirements specifying the authorized retail territory and the sales target. In 2008, the plaintiff disobeyed the minimum resale price requirement in a bid for a customer outside its authorized retail territory. Consequently, the defendant revoked the plaintiff's retail authorization. In response, the plaintiff filed a suit before the Shanghai First Intermediary Court in 2010. It accused the defendant of committing RPM that is prohibited under Art 14 of the AML, and claimed damages caused by the defendant's revocation of the retail authorization.[200]

2.9.1.1 The Shanghai First Intermediary Court's Assessment

A Primitive Analytical Framework Based on Effects

The Shanghai First Intermediary Court delivered its judgment in 2012, ruling against the plaintiff. The judgment was brief. The Intermediary Court started by clarifying the concept of "monopoly agreements" that is to be prohibited under Art 14 of the AML. It did so by highlighting the second paragraph of Art 13, which defines "monopoly agreements" as the following:

> For the purposes of this Law, monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition.

On that basis, the Intermediary Court made the following ruling: to trigger the prohibition of Art 14, an RPM clause in an actual case must first fit the legal profile of a "monopoly agreement". In other words, an RPM clause must possess the "effect of competition elimination or restriction" in order to be declared illegal. Subsequently, the Intermediary Court nominated three criteria it considered to be relevant for ascertaining the effect of competition elimination or restriction:

- The market share of the product that the retail agreement in question pertains to,
- The upstream and downstream competitive situations of the relevant market, and
- The RPM clause's extent of impact on the quantity and price of the product supply.[201]

200 The Shanghai First Intermediary People's Court, *Ruibang v Johnson & Johnson (first instance)* (锐邦涌和诉强生案 [2012]沪一中民五（知）初字第169号), May 18, 2012, http://www.hshfy.sh.cn/shfy/gweb2017/flws_view.jsp?pa=adGFoPaOoMjAxMKOpu6bSu9bQw/HO5SjWqimz9dfWtdoxNjm6xSZ3c3hoPTEPdcssz (in Chinese) (accessed November 16, 2018) (hereinafter, "the Shanghai First Intermediary Court judgment on *Ruibang v Johnson & Johnson*"). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references are needed, this chapter directly quotes the relevant sentences in the judgment.

201 Ibid. ("如前所述，对于此类条款是否属于垄断协议，还需要进一步考量其是否具有排除、限制竞争的效果。具体而言，需要进一步考察经销合同项下的产品在相关市场所占份额、相关市场的上下游竞争水平、该条款对产品供给数量和价格的影响程度等因素，才能够得出正确的结论。").

Pursuant to this analytical framework that was intended to ascertain the restrictive effect on competition, the Intermediary Court ruled that the plaintiff failed to prove the existence of a "monopoly agreement" within the meaning of Art 14. It also ruled that the plaintiff failed to prove the causal link between the claimed damages and the RPM clause; instead, it considered the damages (resulted from the revocation of authorization) claimed by the plaintiff to be a matter of a contractual dispute.

However, the Intermediary Court did not provide any further explanations on the assessment criteria it nominated. Therefore, it is difficult to say how solid this analytical framework really was. Consequently, the Intermediary Court's conclusion that the plaintiff failed to meet the standard of proof appeared to be arbitrary: at the very least, it should have looked at the facts advanced by the two parties according to the three categories of assessment criteria, in order to determine whether and to what extent those advanced facts were probative. The Intermediary Court's conclusion that the plaintiff failed to prove the causation between the RPM clause and the damages was also questionable: it failed to acknowledge that the plaintiff's violation of the RPM clause was the direct cause of the defendant's revocation of authorization (namely the termination of the retail contract), which then caused the claimed damages.

2.9.1.2 The Shanghai High Court's Assessment

Establishing a Four-Fold Analytical Framework for Assessing RPM

Ruibang appealed to the Shanghai High Court, which delivered its judgment in 2013. The Shanghai High Court quashed the first instance judgment and ruled in favor of the plaintiff, after finding the RPM clause in question to have constituted a "monopoly agreement" within the meaning of Art 14 of the AML.[202] In this judgment, the Shanghai High Court constructed an analytical framework for assessing whether an RPM clause has the effect of competition elimination or restriction (and therefore should be prohibited under Art 14 of the AML). This analytical framework has four folds:

- The competitive situation in the relevant market;
- The market position of the accused undertaking;
- The motive for implementing an RPM clause;
- The weighing of the pro-competitiveness and the anticompetitiveness of the RPM.

First, the High Court examined the competitive situation in the relevant market it defined as the market for medical sutures in Mainland China. Its premise was that, in a product market

202 The Shanghai High People's Court, *Ruibang v Johnson & Johnson (appeal)* (北京锐邦涌和科贸有限公司与强生（中国）医疗器材有限公司纵向垄断协议纠纷二审民事判决书 [2012] 沪高民三(知)终字第63号), August 1, 2013, http://wenshu.court.gov.cn/content/content?DocID=effe7905-b647-11e3-84e9-5cf3fc0c2c18&KeyWord=锐邦涌和 (in Chinese) (accessed November 16, 2018) (hereinafter, "the Shanghai High Court judgment on *Ruibang v Johnson & Johnson*"). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references are needed, this chapter directly quotes the relevant sentences in the judgment.

characterized by insufficient competition, an RPM requirement on one product brand would reduce inter-brand competition by facilitating price collusion between different brands, in addition to reducing intra-brand price competition. On that basis, the High Court defined the relevant market based on the substitutability test, and then it found insufficient competition in that market after considering four indicators: (1) demand inelasticity, (2) customer dependency, (3) high entry barriers, and (4) the defendant's price-control ability (as evidenced by the fact that the product price had not changed for fifteen years).

Secondly, the High Court examined the defendant's position in the relevant market. In that regard, it considered the following aspects of the defendant: (1) estimated market share, (2) brand reputation, (3) the control over retailers, and most importantly, (4) the price-control ability (as evidenced by the unchanged price for fifteen years). It thus found the defendant to have had a very strong position in the relevant market.

Thirdly, the High Court examined defendant's motive behind the RPM clause. The premise was that, although a motive to restrict competition does not always correspond to the actual outcome of a practice under examination, the possibility of that correspondence is significant increased if an undertaking has a strong market position. Under that premise, it looked at the arguments presented by both parties and found the motive behind the RPM clause was to avoid price competition.

Lastly, the High Court discussed the competitive effects of the RPM clause in question. In that regard, it weighed both the anticompetitive effects and the pro-competitive effects. Here, the High Court alleged the following sets of harm caused by the RPM clause in question:

(1) The *elimination of intra-brand competition* between the retailers, as evidenced by the sustained high level of price;
(2) The *restriction of inter-brand competition* between the defendant and other suture producers, in the sense that the RPM scheme facilitated price collusion;
(3) The *restriction of the retailers' freedom of pricing*. This is essentially the first harm allegation described from the retailers' perspective. Namely, the High Court used retailers' freedom to set their own prices as a proxy for verifying intra-brand competition restriction. In comparison, the first harm allegation emphasizes a concern for consumer-exploitation in the form of high prices, whereas this allegation emphasizes a concern for competition restriction.

The defendant claimed that the RPM clause induced the following pro-competitive effects: guaranteeing product quality, preventing retailer free riding, and facilitation the introduction of new products. The High Court examined these claims, but found them having no factual basis. Therefore, it concluded that the RPM clause in question should be prohibited under Art 14 of the AML.

Overall, one could easily observe this four-fold framework's emphasis on market power and its dogmatic analysis. In that regard, this analytical framework is reminiscent of the abuse of dominance rationale.

A Misinterpretation of Art 14 of the AML

This judgment was plausible for setting an elaborate example on how to assess an RPM clause under the AML. Undoubtedly, it will serve as a point of reference in subsequent RPM cases for the analytical framework it proposed. However, one should not overlook that this analytical framework was based on a misinterpretation of Art 14 of the AML.

Art 14 of the AML reads as follows:

> Undertakings are prohibited from concluding the following monopoly agreements with their trading counterparts:
> (1) On fixing the prices of commodities resold to a third party;
> (2) On restricting the lowest prices for commodities resold to a third party; and
> (3) Other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

The High Court understood Art 14 as follows:

> In this Court's opinion, the minimum RPM agreement regulated in Art 14 of the AML must possess the effects of competition elimination or restriction in order to be recognized as a monopoly agreement.

In other words, the High Court perceived a gap between *the concept of minimum RPM agreement* that is described in Art 14(2), and *the concept of "monopoly agreement"* that is mentioned in Articles 13 and 14 and is to be prohibited accordingly. It considered that gap to be "the effects of competition elimination or restriction". Therefore, according to the High Court, the mere existence of an RPM agreement is not enough for it to be found illegal; instead, the finding of illegality must be based on that agreement's effects of competition elimination or restriction.

This is where disputes rise. Arguably, the minimum RPM agreement stipulated in Art 14(2) is an enumeration of the legal concept "monopoly agreement", and therefore incorporates already the effect-based legality threshold. In that sense, indeed the mere existence of a minimum RPM in an actual case should not be illegal, but that is only because it does not (yet) fit in the legal profile of "minimum RPM agreement" stipulated in Art 14(2). In other words, there is indeed a gap, but that gap is on the factual level, between "a factually identified minimum RPM agreement in actual case circumstances" and "the legal concept

of minimum RPM agreement in Art 14(2)". What the High Court did was erasing that factual gap and replacing it with an artificially constructed gap on the legal level. In that sense, the High Court misinterpreted Art 14.

Implication of the Misinterpretation: An Expansion of the Judicial Review Scope

With this misinterpretation, the High Court effectively expanded its scope of judicial review. This expansion can be elaborated from two aspects.

First, the High Court took over the two parties' initiatives to submit proof. Namely, if the gap had remained on the factual level, the issue of whether there were any restrictive effects would need to be solved primarily by the plaintiff and the defendant. In that event, the Court would need to exert its inquisitional power only as a supplementary to the two parties' proof and cross-examination. For example, the plaintiff may not be able to obtain certain information concerning the defendant's market position, due to information asymmetry. When that happens, the presiding judge may need to order the defendant to produce such information at the request of the plaintiff, upon the consideration of fairness and proportionality.[203]

Secondly, the High Court circumvented Art 15 of the AML, which reads as follows:

> The provisions of Article 13 and 14 of this Law shall not be applicable to the agreements between undertakings which they can prove to be concluded for one of the following purposes:
>
> (1) Improving technologies, or engaging in research and development of new products; or
> (2) Improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production;
> (3) Increasing the efficiency and competitiveness of small and medium-sized undertakings;
> (4) Serving public interests in energy conservation, environmental protection and disaster relief;
> (5) Mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression;
> (6) Safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or
> (7) Other purposes as prescribed by law or the State Council.
>
> In the cases as specified in Subparagraphs (1) through (5) of the preceding

203 The Civil Procedure Law of the People's Republic of China (《中华人民共和国民事诉讼法》), adopted by the National People's Congress on April 9, 1991, last revised on June 27, 2017, effective on July 1, 2017, http://www1.lawinfochina.com/display.aspx?id=23601&lib=law (accessed November 16, 2018).

> paragraph, where the provisions of Articles 13 and 14 of this Law are not applicable, the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable the consumers to share the benefits derived therefrom.

A literal reading of Art 15 suggests that it is intended to provide the possibility of exemption for the defendant *after* an agreement has been legally established as a "monopoly agreement". In other words, the examination of whether an agreement fits the legal profile of "monopoly agreement" within the meaning of Articles 13 and 14 does not require a weighing of pro-competitive and anticompetitive effects. Supposedly, that weighing should be performed after an agreement has been found possessing anticompetitive effects and therefore constituting a "monopoly agreement". Also, to acquire such an exemption, the defendant is supposed to assume the burden of proving, among other things, the pro-competitive effects. In that sense, by absorbing the pro-competitiveness examination, this four-fold analytical framework compromised the supposedly "second-stage" exemption examination (as envisaged by Art 15). As a result, the defendant, who committed a monopoly agreement, was relieved of the burden (and the initiative) to prove the pro-competitiveness.

A possible account can be provided for the High Court's power expansion: there was a need to clarify the AML's application to RPM agreements, and this case provided a timely opportunity for the Shanghai High Court to do that. The High Court succeeded by establishing a framework for RPM analysis, which would be a point of reference for subsequent RPM enforcement. However, when drawing inspirations from this judgment, an AML enforcer should not overlook the obvious misinterpretation in the High Court' judgment.

2.9.2 The *Medtronic* Decision

This was a case handled by the NDRC in 2016. The undertaking in question was Medtronic, a multinational medical equipment provider. The NDRC found it to have concluded and implemented RPM agreements with its first-degree distributors from 2014 to 2016 regarding the sales of cardiovascular medical equipment, medical equipment of restorative therapy, and medical equipment for diabetics.[204]

2.9.2.1 The NDRC's Theory of Harm

The NDRC found the RPM agreements in question to have included the following contents:

- Fixed RPM, in the forms of direct fixing and the fixing of gross profit margin, and
- Minimum RPM, in terms of bidding and sales to hospitals.

204 The NDRC, *The Medtronic Decision* (国家发展和改革委员会行政处罚决定书[2016]8号), December 5, 2016, http://www.ndrc.gov.cn/gzdt/201612/t20161209_829720.html (in Chinese) (accessed November 16, 2018). There was no pagination in the official online version of this decision. In that light, page-specific references to this decision are omitted here and in subsequent descriptions of this case.

The NDRC alleged three aspects of harm:

- The restriction of price competition between distributors;
- The restriction of competition between different medical equipment brands;
- The impairment of end-consumer interests, as a result of the sustained high prices.

The NDRC did not expand much on these harm allegations. Therefore it is difficult to establish the NDRC's theory of harm. In any event, there is one noticeable problem: the NDRC seems to have conceptually allocated the anticompetitiveness of some other practices to the RPM agreements in question. The NDRC did not single out those practices, but one could identify them by reading the NDRC's description of facts and its second allegation of harm.[205]

Another notable point is that, when making the second harm allegation, the NDRC claimed that it took into account Medtronic's market power. It considered the following criteria: Medtronic's market share, financial strength, and technological advantages. This was reminiscent of a dominance analysis. However, the NDRC did not engage in a more specific examination; nor did it show any exemption consideration.

2.9.3 Yutai v The DRC of Hainan Province

As introduced in Section 3.1.2 of Chapter 4, this is one of the five recorded administrative litigation cases in the tripartite era. This case is unique in two aspects. First, it is the only administrative litigation case on RPM in the tripartite era. Secondly, it had an interesting "twist": The first instance judgment (delivered by the Haikou Intermediary Court of Hainan Province) annulled the enforcement decision by the DRC of Hainan Province, but in the appeal, the Hainan High Court reversed the first instance judgment and upheld the enforcement decision. This twist secured the zero success rate of challenging an AML enforcement decision in the tripartite era.

The case facts were simple: Yutai was a fish fodder producer in Hainan Province. In 2014 and 2015, it concluded with its retailers an agreement. This agreement obliged the retailers to adhere to Yutai's recommended retail prices; a retailer's failing to do so would justify Yutai's reduction of profit transfer to the retailer. On February 28, 2017, the Hainan DRC issued an AML enforcement decision, which sanctioned Yutai for committing fixed RPM. The Hainan DRC found that the retailers did not adhere to the recommended retail prices. It also found that Yutai did not monitor the retailers' prices, nor did it punish the disobedient retailers in accordance with the agreement. The Hainan DRC held that these two findings of fact could not prevent the agreement in question from being qualified as a fixed RPM agreement within the meaning of Art 14(1) of the AML; they could be considered only for the reduction of fines.

205 For a detailed analysis of this problem, see Xingyu Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime: The Inevitable Overstepping of Authority and the Implications," *Journal of Antitrust Enforcement* 6, no. 1 (2018): 147–48, https://doi.org/10.1093/jaenfo/jnx018.

2.9.3.1 The Haikou Intermediary Court's (Quashed) Assessment

Interpreting Art 14 in Connection with Art 13(2)

Yutai challenged the DRC decision before the Haikou Intermediary Court. The Intermediary Court delivered a judgment annulling the DRC decision.[206] It interpreted Art 14 of the AML in connection with Art 13(2), as both provisions refer to the concept of "monopoly agreements".[207] More specifically, it considered that, for a vertical agreement to be prohibited under Art 14, first it has to fit the profile of "monopoly agreements". According to Art 13(2), this means that it must have the effects of eliminating or restricting competition.[208]

On that basis, the Intermediary Court examined the case circumstances at hand according to a list of factors, including Yutai's business scale, Yutai's market share in the fodder production market, the level of competition in the fodder market, the impact of the agreement in question on the quantities and prices of the retail supplies, etc. After examining these factors, it found that the agreement in question was not able to induce effects that eliminate or restrict competition, and therefore did not qualify as a monopoly agreement within the meaning of Articles 13(2) and 14.[209] Eventually, it annulled the DRC decision for the decision's erroneous application of the law.[210]

2.9.3.2 The Hainan High Court's Assessment

The Hainan DRC's Arguments

The Hainan DRC appealed to the Hainan High Court. Its main argument was that the Intermediary Court erred in applying the AML by construing "the effects of competition elimination or restriction" as a constitutive element of the "monopoly agreements" concept. More specifically, the Hainan DRC argued that the Intermediary Court should not have read

206 The Intermediary Court's judgment is not publicly disclosed, but the appeal judgment by the Hainan High Court made a summary of it. This subsection relies on that summary to describe the Intermediary Court's theory of harm.

207 These two AML provisions are introduced respectively in Sections 2.9.1.1 and 2.9.1.2 concerning the *Ruibang v Johnson & Johnson* case.

208 The Hainan High People's Court, *Yutai v The DRC of Hainan Province* (海南省物价局与海南裕泰科技饲料有限公司行政处罚二审行政判决书 [2017] 琼行终1180号), December 11, 2017, http://wenshu.court.gov.cn/content/content?DocID=23889d51-88d8-4e87-aaa4-a85c01845f73&KeyWord=海南裕泰科技饲料有限公司 (in Chinese) (accessed November 16, 2018) (hereinafter, "the Hainan High Court judgment on *Yutai v The DRC of Hainan Province*") ("对于反垄断法第十四条所规定的垄断协议的认定，不能仅以经营者与交易相对人是否达成了固定或者限定转售价格协议为依据，而需要结合该法第十三条第二款所规定的内容，进一步综合考虑相关价格协议是否具有排除、限制竞争效果。"). There was no pagination or numbering of paragraphs in the official online version of this judgment. Therefore, page or paragraph-specific references to this judgment are omitted here and in later descriptions of this case. When more specific references are needed, this chapter directly quotes the relevant sentences in the judgment.

209 Ibid. ("现有证据表明，裕泰公司的经营规模、市场所占份额等上述因素不具有排除、限制竞争效果，不构成垄断协议。").

210 Ibid. ("因此，海南省物价局依据反垄断法第十四条第一款第（一）项、第四十六条、第四十九条规定对裕泰公司作出琼价监案处[2017]5号《行政处罚决定书》，属于适用法律错误。").

Art 14 of the AML in connection with Art 13(2),[211] because in its opinion, fixed RPM within the meaning of Art 14(1) should be subject to a rule of "competition restriction by object".[212] To support this argument, the Hainan DRC made a brief reference to the "restriction by object/effect" paradigm in EU competition law.

The Hainan DRC also brought Art 15 of the AML into its arguments. It claimed that the Intermediary Court's finding of no competition-restrictive effects (after examining the abovementioned list of factors) practically exempted the agreement in question, and consequently rendered Art 15, which prescribes possible justifications for a monopoly agreement, void.[213]

The Hainan DRC also brought in Art 46 of the AML. This provision stipulates that an enforcement agency has the discretion to sanction an undertaking that concluded but did not implement a monopoly agreement. As the DRC claimed, the fact that the Intermediary Court's logic of "no competition restrictive effects, no monopoly agreement" prevented the enforcement agencies from effectively applying this provision, at the risk of under-enforcement and under-deterrence.[214]

The Hainan DRC also argued that, contrary to the Intermediary Court's finding, the agreement in question had actually generated competition-restrictive effects. The DRC acknowledged the fact that the retailers did not adhere to the RPM requirement and Yutai did not punish those disobedient retailers. But in that regard, it pointed to *the restriction of the retailers' pricing autonomy*, resulted from the fact that those retailers had to bear the uncertainty and the risk of being punished for breaching the agreement. In addition, the DRC pointed to Yutai's intention to restrict competition, which was shown in the RPM agreement. It also mentioned the transparent structure of the fodder production market and the ensued potential of inter-brand collusion in RPM.

Lastly, the Hainan DRC raised the point of agency discretion: in its opinion, AML public enforcement cases are different from AML private enforcement cases, as in the former, the enforcers enjoy a certain degree of administrative discretionary power conferred by the

211 Ibid. ("反垄断法更没有任何条款规定反垄断法第十四条明文禁止的垄断协议还需再结合第十三条第二款进行具体验证和证明。").

212 Ibid. ("根据反垄断法第十四条第一款关于纵向垄断协议的规定，该协议因目的违法而被法律明文禁止，此类协议一经签订即构成垄断协议，不需要再根据是否存在排除、限制竞争效果来确定是否构成垄断协议。").

213 Ibid. ("一审判决以"经营规模、相关市场所占份额……"等上述因素为由，认定明显排除限制品牌内价格竞争的涉案合同条款不构成垄断协议，其实质上"豁免"了固定转售价格行为，该认定显然与第十五条相冲突，使第十五条形同虚设。").

214 Ibid. ("第四十六条规定对"尚未实施达成垄断协议的，可以处五十万元以下的罚款"。如以实际产生"排除、限制竞争效果"作为垄断协议成立的判断要件，将无法实现"预防和制止垄断行为"的反垄断法立法目的，亦将使得第四十六条关于"尚未实施达成垄断协议的"罚则无从适用。").

AML.[215] However, the DRC did not specify in what aspects of a case it should enjoy agency discretion and the supervision court's deference.

The Dissociation of Art 14 with Art 13(2) on Account of Agency Discretion

The High Court identified the central dispute as whether the concept of "monopoly agreements" within the meaning of Art 14 should contain the constitutive element of "to eliminate or restrict competition" as stipulated in Art 13(2).[216]

In that regard, the High Court held that there is no rule in the AML stipulating that a monopoly agreement within the meaning of Art 14 must include the constitutive element of competition restriction within the meaning of Art 13(2).[217] Furthermore, it confirmed that the AML enforcement agencies indeed enjoy a certain degree of discretion when finding a monopoly agreement. It presented two grounds for this confirmation: The first one is Art 14(3) of the AML, which leaves open the possibility for the enforcement agencies to establish the types of monopoly agreements that are not caught under Art 14(1) and (2).[218] Secondly, a literal reading of Art 14(1) allows an enforcement agency to qualify an RPM agreement at issue *directly* as a monopoly agreement within the meaning of the AML.[219]

Furthermore, the High Court agreed with the DRC that AML public enforcement cases and civil cases should be subject to different standards of judicial review. To justify this, it referred to the rules (Articles 46 and 50) prescribing the different liabilities of an infringing undertaking in these two types of cases. On that basis, the High Court dismissed Yutai's argument that the Intermediary Court's association of Art 14 with Art 13(2) was consistent with the appeal judgment of the *Ruibang v Johnson & Johnson* case and thus should be considered correct.[220]

215 Ibid. ("在反垄断行政执法的司法审查中法院应尊重反垄断执法机关的首次判断权，实行司法自限，不以自己的判断代替反垄断执法机构的判断，只要反垄断执法机关自由裁量权在法律范围之内，一般司法不予干涉，尊重反垄断执法机构的行政自由裁量权。").

216 Ibid. ("双方争议的焦点在于反垄断法第十四条所规定限制固定转售价格的垄断协议是否以该法第十三条第二款规定的"排除、限制竞争"为构成要件。").

217 Ibid. ("未规定该法第十四条所规定的固定转售价格的垄断协议须以该法第十三条第二款规定的"排除、限制竞争"为构成要件。").

218 Ibid. ("明文赋予了国务院反垄断执法机构认定其他垄断协议的权力，表明在反垄断这一特殊领域中，反垄断执法机构在认定垄断协议上拥有一定的自由裁量权。").

219 Ibid. ("从反垄断法关于纵向垄断协议的上述规定来看，直接将"固定向第三人转售商品的价格"视为垄断协议并明令禁止").

220 Ibid. ("裕泰公司以上海市高级人民法院作出的（2012）沪高民三(知)终字第63号民事判决认定反垄断法第十三条第二款规定适用于该法第十四条为由，认为反垄断法第十四条所称垄断协议的成立须以具有排除、限制竞争效果为构成要件。本院认为，本案为关于纵向垄断协议的行政案件，为实现我国反垄断法预防和制止垄断行为、维护消费者利益和社会公共利益的立法目的，行政机关在认定纵向垄断协议时与单个民事主体主张垄断行为造成的实际损失时并不相同。").

Question: Reasonable Judicial Deference or Inadequate Performance of Judicial Review?
There are at least two questionable points in the High Court's judgment.

First, it is questionable whether the agency discretion prescribed by Art 14(3), along with the AML objective to *prevent* monopolistic practices as stipulated in Art 1, would effectively warrant the direct qualification of an RPM agreement at issue as a monopoly agreement that is to be prohibited under Art 14. In other words, when the AML is unclear on the possible link between Art 13(2) and Art 14, it is questionable whether the possible agency discretion would justify overlooking that possible link altogether. Arguably, the unclear link between Articles 13(2) and 14 is a matter of legal interpretation, which requires precisely the work of the judiciary. However, by accepting the DRC's argument of agency discretion without establishing the boundaries of it, the High Court effectively relinquished its supervisory power.

Secondly, it is questionable whether the AML liability rules would justify a differentiation between public enforcement cases and private enforcement cases regarding the matter of how to construe the concept of "monopoly agreements". Arguably, this matter concerns an interpretation of the law and the legal characterization of a practice in question; therefore it should be done evenly in both types of cases. The differentiation of civil and administrative liabilities should come in at a much later stage.

Admittedly, the first instance judgment is not without its problems. Its biggest problem was following the appeal judgment of *Ruibang v Johnson & Johnson*. As discussed in Section 2.9.1.2, the appeal judgment of *Ruibang v Johnson & Johnson* indeed incorporated the requirement of "restrictive effects on competition" into the concept of "monopoly agreements" within Art 14, but it did so based on a misinterpretation of Art 14. In other words, the *Ruibang v Johnson & Johnson* appeal judgment indeed linked Art 14 with Art 13(2), but that link was (arguably) misconstrued and resulted in an undue expansion of the court's scope of review at the expense of respecting the two parties' initiatives and burdens of proof. Therefore, by following that judgment, the Intermediary Court in this case also made a mistake: it annulled the DRC decision on the ground that it found no effects of competition restriction. Arguably, this ground was misplaced; a more solid ground for the annulment would be the DRC's failure to meet the standard of proof in terms of qualifying the agreement in question as a monopoly agreement within Art 14(1). The Intermediary Court should not have taken over the burden of proof of the DRC regarding the competition-restrictive effects.

If the Intermediary Court had ruled on that ground, the DRC would still be able to appeal, and possibly win, by advancing its presumptions and findings of competition-restrictive effects, which the DRC referred to as the uncertainty and the risk of being punished borne by the retailers when breaching the RPM agreement.

3 Interim Conclusions

3.1 The Allegations of Harm

Based on the case analyses in Section 2, the allegations of harm in the court judgments and the agency decisions can be compared. In that regard, it can be observed that the enforcement agencies, particularly the SAIC, showed a better grasp of the anticompetitiveness of various types of conduct in general when compared with the judiciary. This observation can be explained from two aspects.

3.1.1 Limited Allegations of Harm by the Courts

In the private enforcement sphere, the courts seem to have been cautious in making harm allegations in their judgments:

- In *Qihoo v Tencent*, both the first instance judgment and the appeal judgment focused on defining the relevant market. It was only in the appeal judgment that the Supreme Court briefly and hypothetically alleged the harm of the "choose-one-from-two" practice in question: the leveraging of market power from the dominant market to a neighboring one.[221]
- This cautious attitude was even more obvious in *Yang Zhiyong v China Telecom*, where the Shanghai High Court assessed the abusiveness of the conduct in question without a prior finding of dominance. It eventually found no abuse, not on the basis of a substantive examination but on the ground that the plaintiff failed to meet the standard of proof.
- In some other cases, a dominant position was clearly present, and therefore the hearing court was confronted with the task to examine the abusive conduct in question. But even so, the court managed to avoid making any allegation of harm by incorrectly denying the factual existence of an abuse. That was the case in *Wu Xiaoqin v Shaanxi Broadcast* and *Yunnan Yingding v Sinopec*. In the *Wu Xiaoqin* case, the Shanxi High Court made two logical mistakes in an attempt to deny the existence of a tying practice (although this ruling was quashed by the Supreme Court in the retrial); in the *Yunnan Yingding* case, the Kunmng Intermediary Court denied the existence of a refusal to deal by equating the concept of "deal" in the AML context with that in a contract law context.
- Seemingly, it was only in cases where the circumstances indcated strongly a "no abuse of dominace" conclusion that the courts became more willing to clarify the possible types of harm of the conduct in question. That was the case in *Gu Fang v China Southern Airlines* and *Xu Shuqing v Tencent*. Both cases were handled by the Guangdong High Court, and both were about a consumer suing an undertaking for refusing to deal. In the event that the refused parties in both cases engaged in no market competition, the Guangdong High Court accentuated the harm of

221 The Supreme Court judgment on *Qihoo v Tencent*, 92 (note 30 above).

comeptition foreclosure of a refusal to deal. It suggested in the *Gu Fang* case that a consumer could be harmed only when the withheld product is public by nature.

Yutai v The DRC of Hainan Province is the only administrative litigation case analyzed in Section 2. In this case, the central dispute was how to apply Art 14 of the AML to a suspected RPM agreement. In that event, both the first instance court and the appeal court did not question the enforcement agency's allegations of harm, nor did they advance any new allegations. Instead, they focused on whether the enforcement agency in question substantiated its allegations of harm by its disputed way of interpreting Art 14.

3.1.2 Consistent Allegations of Harm by the Enforcement Agencies

In the public enforcement sphere, the administrative agencies showed consistent efforts in alleging the types of harm in the cases they handled. This is particularly exemplified in the SAIC's enforcement records:

- In the *Tetra Pak* case where three types of abuse (tying, exclusive dealing, and loyalty rebates) were involved, the SAIC consistently focused on the harm of competition restriction. For the abuse of tying, it used "customer choice limitation" as a proxy concern; for exclusive dealing, it advanced "input foreclosure"; for loyalty rebates, it developed an effects-based analytical framework (despite the limited extent of effects-analysis).
- In the twelve regional cases concerning tying and the imposition of unreasonable trading conditions, the harm of monopoly exploitation was commonly alleged. As explained in Section 2.3.3.1, the advancement of the exploitation harm was expected, because most of these cases were about legal monopolies, so there was no competition to foreclose in the first place.[222] Nonetheless, in cases where there was room for competition, the foreclosure harm was consistently advanced.[223] In several cases, "customer choice limitation" was advanced as an intermediary concern for either the exploitation harm or the foreclosure harm or for both.[224] There are some occasionally ill-defined allegations of harm, in the sense that those allegations were not based on a proper identification of the abuses in question,[225]

222 It was like that in the following cases: the *Inner Mongolia Chifeng Tobacco* case; the *Chongqing Natural Gas* case; the *Hainan Dongfang Tap Water* case; the *Liaoning Fushun Tobacco* case; the *Qingdao Xin'ao Xincheng Natural Gas* case; the *XilinGol League Broadcast Television* case; the *Wujiang Huayan Water Supply* case; the *Sichuan Jiuyuan Yinhai Software* case.

223 Such cases include the following: the *Guangdong Dayawan Yiyuan Water Supply* case; the *Alxa Left Banner Water Supply* case; the *Wujiang Huayan Water Supply* case; the *Wuhan Xinxing Pharmaceutical* case.

224 Such cases include the following: the *Guangdong Dayawan Yiyuan Water Supply* case; the *Alxa Left Banner Water Supply* case; the *XilinGol League Broadcast Television* case; the *Wujiang Huayan Water Supply* case; the *Sichuan Jiuyuan Yinhai Software* case.

225 Cases having this problem include the *Guangdong Dayawan Yiyuan Water Supply* case and the *Wuhan Xinxing Pharmaceutical* case.

or that the allegations of harm were merely rhetorical and non-circumstantial.[226]

- In the three restrictive dealing cases, the local AICs consistently alleged two sets of harm: the restriction of competition in a tied market[227] and the limitation on customer choice.
- In the three discriminatory treatment cases, the local AICs consistently advanced the harm of secondary-line competition disruption.
- In the two cases concerning refusal to deal, the Chongqing AIC consistently alleged the harm of input-foreclosure of competition in a downstream market, despite an inaccurate identification of the abuses in question in the second case.

The NDRC has significantly fewer cases on record. This is attributable to its lack of information disclosure. Its allegations of harm were not as systematic as the SAIC's but were nonetheless present. Acting as a price-control authority, it frequently emphasized the harm of unfairness (monopoly exploitation) of high prices borne by consumers:

- In *Qualcomm*—the NDRC's highest profile AML case, three abuses were identified: excessive pricing, tying, and the imposition of unreasonable trading conditions. Regarding the excessive pricing, the NDRC alleged the harm of unfairness in the sense of monopoly exploitation; regarding the tying, it alleged the harm of competition foreclosure, using customer choice limitation as a proxy concern. Regarding the third abuse, however, it had a misplaced concern for downstream competition restriction, resulted from an inaccurate characterization of the conduct in question.
- In the *Zhejiang Second Pharmaceutical* case, two abuses were identified: excessive pricing and refusal to deal. Regarding the first abuse, the NDRC briefly alleged the harm of unfairness; regarding the second abuse, it alleged the harm of downstream competition distortion (resulted from the input-foreclosure of the customers) and the impairment of consumer interests.
- In the *Medtronic* case concerning RPM, the NDRC alleged three aspects of harm, including intra-brand competition restriction, inter-brand competition restriction, and the impairment of consumer interests. It did not provide much explanation on these allegations. These allegations appeared disputable, because they were based on an inaccurate identification of the anticompetitive practices involved in this case.

By comparing the harm allegations of the courts and the agencies, one could observe a contrast between the courts' reluctance in showing their comprehension of the types of competitive harm at hand and the agencies' consistent willingness and efforts therein.

226 Cases having this problem include the *Liaoning Fushun Tobacco* case, the *Yongzhou Salt Industry* case, and the *Sichuan Jiuyuan Yinhai Software* case.

227 As explained in Section 2.5, "restrictive dealing" by the wording of the AML actually shares the same rationale with tying.

From an institutional perspective, one possible explanation for this contrast is that the courts operate only *reactively* whereas the agencies operate *proactively*.[228] Therefore, the enforcement agencies handle AML cases much more frequently by acting on their own initiative. In that light, and since the AML (civil and administrative) litigations are yet to reach a scale that enables the courts to apply the law on a more regular basis, the courts have significantly fewer opportunities to accumulate their AML expertise. Consequently, the courts' grasp of the AML has remained largely at a generalist level, and their generalist perspectives have inhibited them to a large extent from accurately describing the types of competitive harm at stake in actual cases.[229]

On account of the underdeveloped expertise, a further consequence is the courts' increased susceptibility to judicial capture. Namely, a presiding court could unintentionally invent a distortive[230] theory of harm that leads to a conclusion favorable a party, as a result of the information asymmetry and the inadequate AML expertise. Even if we could neutralize the risk of judicial capture, there is still the possibility that a case-handling court invents a distortive theory of harm simply for the self-interest of enhancing its institutional role in the AML enterprise.

Admittedly, the enforcement agencies also have the possibility of inventing distortive theories of harm in the scenarios of regulatory capture and institutional self-interest. However, there is a slight difference between the agencies and the courts: the central and local agencies handle AML cases proactively and more regularly according to their administratively entrusted or delegated responsibilities. From an internal perspective, this makes it slightly more imperative to normalize the case handling procedures and more likely to gain expertise for the agencies than for the courts, and consequently generates more self-restraints in the case of the former than the latter.[231] From an external perspective, the more regular enforcement activities make the agencies more exposed to public monitoring. These two factors help reduce, to a certain extent, the chances of distortive theories of harm being invented.

Therefore, one could say that, compared with an enforcement agency, a court is, to a certain extent, more likely to invent a distortive theory of harm, in a scenario of judicial capture or a scenario where it is simply motivated to enhance its institutional role. The first scenario is

228 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York: Cambridge University Press, 2008), 64, 71 (highlighting the reactiveness of the courts' function mechanism).

229 Michael R. Baye and Joshua D. Wright, "Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals," *The Journal of Law & Economics* 54, no. 1 (2011): 20, https://doi.org/10.1086/652305 (finding that non-specialized judges tend to refrain from assessing complex antitrust issues even when they have had basic economic training).

230 Briefly speaking, "distortive" means that such theories of harm fail to meet the standard of internal logic coherence and the standard of making general economic sense.

231 The point regarding self-restraint is discussed in Section 2.3.1.2 of Chapter 2 of this dissertation.

yet to be verified in the collected cases, due to the limited information disclosure; but there has been strong evidence suggesting the existence of the second scenario. This is discussed in the following subsection.

3.2 The Elaboration of Theories

3.2.1 A Trend of Judicial Activism and Its Impact on the Courts' Reasoning

While the courts are less active than the enforcement agencies in making harm allegations, they seem to be more engaged in elaborating their "theories" of harm (in the sense of legal reasoning).

There is one apparent account for this observation: a court as an adjudicator is presented with the task of addressing the factual and legal disputes advanced by the parties; it has to be elaborate in its legal reasoning in order to perform its institutional functions. This is exemplified by the fact that the court judgments selected in this Chapter are on average longer than the enforcement decisions, as they contained the parts describing and examining the disputes between the parties.

There is also a less apparent account: an observable trend of judicial activism among the courts in applying the AML.[232] This trend could be attributed to the dual-track institutional setting, which enabled a set of "competitive" dynamics between the courts and the enforcement agencies. As shown in the private enforcement cases, the courts went to great lengths to expand their scope of judicial review in the AML enterprise, and at the same time they showed a general lack of willingness to engage in complex economic assessments (possibly due to their generalist background).[233] The ensued problem is that they produced questionable theories of harm in the cases they handled. In other words, the courts, while possessing limited competition law expertise, expanded their scope of judicial review at the expense of honoring the AML text and producing legal reasoning that is logically coherent and economically sensible. This problem is identifiable in the following cases:

- In *Qihoo v Tencent*, the Guangdong High Court attempted to adopt the SSNIP test to define an online platform market without taking into account that the platform product in question was offered free of charge. Also, it selectively considered, without justification, the two-sidedness of the platform market. This eventually led to a conclusion of non-dominance in the accused undertaking's favor. The High Court was also problematically evasive in addressing certain disputes raised by the plaintiff. In the appeal, although the Supreme Court overruled the application

232 Eric C. Ip and Kelvin Hiu Fai Kwok, "Judicial Control of Local Protectionism in China: Antitrust Enforcement against Administrative Monopoly on the Supreme People's Court," *Journal of Competition Law & Economics* 13, no. 3 (2017): 562–64, https://doi-org.proxy-ub.rug.nl/10.1093/joclec/nhx018 (demonstrating the judicial activism led by the Supreme People's Court in regulating local administrative monopolies).

233 Baye and Wright, "Is Antitrust Too Complicated for Generalist Judges?," 20.

of the SSNIP test to platform markets, it upheld the Guangdong High Court's conclusion of non-dominance without performing a thorough review. Moreover, it established the ruling that a clearly defined relevant market is not required in every abuse of dominance case. In the event that the AML and the Guidelines on the Definition of the Relevant Markets provide no specific guidance on how to define an online-platform market, the Supreme Court judgment and the upheld part of the Guangdong High Court's rulings became preemptively the yardstick for future judicial cases.

- In *Yang Zhiyong v China Telecom* concerning the issue of dominance establishment, the Shanghai High Court took an astonishing leap: it examined the abusiveness of the conduct in question without first defining a relevant market and finding a dominant position. Arguably unjustifiable, this leap effectively expanded the Shanghai High Court's discretionary power in admitting and dismissing the claims and the submissions of evidence by the two parties.
- In *Yunnan Yingding v Sinopec*, the Kunming Intermediary Court construed the AML concept of "refusal to deal" in a contract law context. By doing so, it discretionarily avoided addressing a central issue in refusal to deal cases: the balancing of the freedom of contract and the protection of competition.
- The attempt to expand judicial discretion was most obvious in the appeal of *Ruibang v Johnson & Johnson*. In this case, the Shanghai High Court misinterpreted Art 14 of the AML in order to include the balance of pro-competitiveness and anticompetitiveness of RPM into its discretionary scope, at the expense of conforming with the exemption assessment process stipulated in Art 15 of the AML.

The courts' activism in private enforcement cases is in stark contrast with the judicial deference observed in *Yutai v The DRC of Hainan Province*. In the appeal of that case, the Hainan High Court endorsed the accused agency's claim of administrative discretion all too easily. In fact, it can be argued from two aspects that the High Court failed to fulfill its supervisory responsibility. Based on this case and the other civil cases, one could say that the courts have demonstrated a preference of limiting themselves in the sphere of private enforcement, where they are much less constrained in exercising and possibly expanding the judicial power. However, to confirm this observation, more administrative litigation cases are needed.

3.2.2 The Unsupervised Agencies and the Inadequate Enforcement

The public enforcement decisions are less elaborate in their legal reasoning compared with the private enforcement judgments.

One obvious explanation for the conciseness of the enforcement decisions is that there is a steep learning curve for the enforcement agencies of a competition law regime that has been operationalized for only a decade. From an institutional perspective, another

explanation is that the tripartite delimitation inhibited the performance-optimization of the NDRC and the SAIC: in cases where the two agencies had overlapping authority, the deciding agency had to be evasive (about the practices in question) or distort its theory of harm, so as not to infringe the jurisdictional delimitation established by the State Council.[234] Such cases include the following:

- The *Medtronic* case handled by the NDRC;
- The *Chongqing Southwest No.2 Pharmaceutical* case handled by the Chongqing AIC;
- The *Guangdong Dayawan Yiyuan Water Supply* case handled by the Guangdong AIC;
- The *Wuhan Xinxing Pharmaceutical* case handled by the Hubei AIC.

Nonetheless, these two explanations do not fully explain why the enforcement agencies were *relatively* less elaborate on their theories of harm than the courts. In that regard, one possible account is the structurally induced selective enforcement. Namely, due to the lack of judicial supervision, the enforcement agencies enjoyed a high degree of discretionary power in the public enforcement sphere; when this discretionary power was coupled with the agencies' susceptibility to political swaying, selective enforcement would be inevitable.[235] Therefore, the agencies had cherry-picked all the cases that made it to the "decision stage". Those cases were either "easy" ones (based on the parameters that they were on a regional scale and that the case circumstances were relatively clear), or they were strategically (in a context beyond the AML) important to be decided. Most of the AIC cases could fit into the first scenario. There are two cases that could fit into the second scenario: *Qualcomm* by the NDRC and *Tetra Pak* by the SAIC. Both cases had rather elaborate theories of harm, exemplifying that the enforcement agencies were able to perform in-depth examinations but perhaps they just preferred to allocate their analytical resources on cases that they considered strategically important. In turn, such strategic importance is subject to policy agenda setting. This is exemplified in the *Qualcomm* case, where many speculations emerged as to what promoted the NDRC's investigation against Qualcomm in the first place.[236]

234 Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime," 149.

235 Ibid., 144.

236 A plausible speculation is that the launch of the *Qualcomm* case had a lot to do with the Chinese government's industrial policy adjustment in accordance with the telecommunication development from 3G to 4G technologies. Namely, filing an AML case against Qualcomm was the Chinese government's countermeasure to constrain Qualcomm from excessively charging for TDD-LTE patent licensing to the extent of inhibiting the development of Chinese telecommunication companies in the 4G era. For a critical description of the reasoning in the *Qualcomm* decision, see generally, Thomas K Cheng, "The PRC NDRC Case against Qualcomm: A Misguided Venture or Justified Enforcement of Competition Law?," *Journal of Antitrust Enforcement* 5, no. 1 (2017): 76–99, https://doi.org/10.1093/jaenfo/jnw005. For an elaboration of the abovementioned speculation, see Shao Geng, *The* Qualcomm *Case: Three Parts of Stories and the Biggest Problem* (高通案：三段故事与最大问题), Zhihu Website, https://zhuanlan.zhihu.com/p/19967180 (in Chinese) (accessed November 16, 2018).

CONCLUSIONS

7

Table of Contents

1 Two Models of Institutional Dynamics

As described in Section 2 of Chapter 3 and Sections 2–4 of Chapter 4, the institutional settings of the EU and Chinese laws on abuse of dominance are different. For a start, the EU regime at the supranational level does not have private enforcement, but the Chinese regime does. The Commission monopolizes the law enforcement at the EU level. The only way for the CJEU to handle private enforcement cases is to answer preliminary questions submitted by the courts of the Member States. Meanwhile, the Chinese AML has a dual-track enforcement regime. The Chinese judiciary is supposed to handle both private and public enforcement cases in accordance with the jurisdictional rules laid down by the AML and the Judicial Interpretation of the Supreme People's Court.

However, the Chinese regime has the idiosyncrasy that judicial supervision on the AML public enforcement by the administrative agencies exists in the law "in the books" but is largely absent in the law "in action". This is evidenced by the fact that, for a decade of enforcement, there have only been five suits lodged to challenge AML public enforcement decisions, and all five of them were closed with the courts siding with the accused agencies. This is described in Section 3.1.2 of Chapter 4. As previous studies and Section 3.1.3 of Chapter 4 have suggested, the virtual absence of judicial supervision on administrative agencies is embedded in China's authoritarian ruling: Judicial supervision on administrative agencies serves as a third-party mechanism for the "ruler" (as the "principal") to rein the administrative agencies (as the "agent") when carrying out the delegated law-application responsibilities; this is cost-efficient for the ruler, since the monitoring costs are paid by the private litigants.[1] Therefore, it is no surprise that, because of the lack of independence, the extent of judicial supervision on administrative agencies is severely limited.[2]

Accordingly, the institutional dynamics in the two regimes are different. The EU regime is one centered by the Commission and supervised by the CJEU, and therefore the "agency-court" institutional dynamics take place in a *supervisory* model. Meanwhile, the Chinese regime is a dual-track one where private enforcement and public enforcement are practically in parallel; therefore the "agency-court" institutional dynamics are set in a *competitive* model when it comes to the interpretation and application of the law.

1 Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York: Cambridge University Press, 2008), 63.

2 Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 397, 420–24 (viewing administrative litigation as one of the mechanisms for controlling bureaucracy and explaining its several aspects of limitations in that regard). See also, Ji Li, "The Leviathan's Rule by Law," *Journal of Empirical Legal Studies* 12, no. 4 (2015): 838 (observing through a case study that despite the increased institutional autonomy, the Chinese Supreme People's Court "remains a ready servant of the state when its core interests are at stake"); He Haibo, "Litigations without a Ruling: The Predicament of Administrative Law in China," *Tsinghua China Law Review* 3 (2011): 265–66, 271–74 (explaining how the lack of real judicial independence embedded in the regime made judges reluctant to apply the Chinese Administrative Litigation Law and thus rendered the promises of that law largely illusionary).

2 The Within-Regime and Cross-Regime Differences in the Theory-of-Harm Production

2.1 The Within-Regime Difference

By adopting an institutional perspective, one could observe a difference between the agencies and the courts within a regime regarding their respective production of theories of harm. Namely, while the agencies are more adept at alleging the types of competitive harm at stake, the courts are more comfortable at elaborating the "theories" of the relevant types of harm. This is the case for both the EU regime and the Chinese regime, as shown in the interim conclusions in Section 3 of Chapter 5 and Section 3 of Chapter 6. These two sections also offer more nuanced observations regarding this within-regime difference in the context of each regime:

- In the supervisory model of the EU regime, this difference promotes an informal division of labor between the Commission and the CJEU, since the CJEU plays only a reactive role in examining the "production ingredients" pre-selected by the Commission (in annulment cases) and the Member State courts (in preliminary ruling cases).
- In the competitive model of the Chinese regime, this difference is also present, but mainly because the courts are far less frequently exposed to competition law cases and thus have less expertise in that area.

2.2 The Cross-Regime Differences

The cross-regime differences refer to the differences between the EU regime and the Chinese regime as wholes pertaining to the theory-of-harm production. One could identify two cross-regime differences by comparing the interim conclusions in Section 3 of Chapter 5 and Section 3 of Chapter 6.

The most prominent difference pertains to their emphases on the types of harm. On most occasions, both regimes have the common concern for competition foreclosure, but besides that they have different emphases: The EU regime consistently advances the concern for market integration, which is the foundational policy mandate internalized in the objectives of EU competition law. Meanwhile, the Chinese regime frequently expresses concerns for monopoly exploitation, which could be attributed to the fact that monopolies, especially administrative ones, are prevalent in the Chinese economy.

Another difference is that the EU regime generally produces more elaborate theories of harm than the Chinese regime. This could be accounted by the inexperience of the law enforcers of the newly established AML regime.

3 An Institutional Account for the Differences in the Production of Theories of Harm

3.1 The Theory of Harm Production in a Supervisory "Court-Agency" Paradigm: The EU Regime

3.1.1 The Court's Adherence to the Legal Text

In a supervisory "court-agency" paradigm, the judiciary demonstrates a high level of loyalty to the legal text (including case precedents). As shown in the case analyses in Chapter 5, as long as "the verbal formulas"[3] of the law permitted it to reach a straightforward answer, the CJEU would become disinterested in adding more economic considerations to a theory-of-harm production. This is exemplified by the CJEU's presumptive rule of illegality on "pricing below average variable costs"[4] and "rebates conditional on the customer's obtaining all, or most, or a given portion of their requirements exclusively from the manufacture".[5] Even when a presumptive rule of illegality is considered to be inappropriate and proof of anticompetitive effects is required, the CJEU still shows a reluctance to engage in intensive economic assessments for the purpose of ascertaining the anticompetitiveness of an abuse: in such cases, it always refers to the ruling that facts-based predictions of *potential* anticompetitive effects would suffice,[6] and tends to use intermediaries, such as exclusionary intentions, to ascertain such potential anticompetitive effects.[7]

This disinterest is institutionally warranted, in the sense that the CJEU's decision-making in individual cases faces no further scrutiny. The ensued risk, however, is the making of Type I (false positive) errors, as discussed in Section 1.3.5 of Chapter 2. This risk is based on the presupposition that a powerful institution is inclined to prohibit things that threaten its

3 John J. Flynn, "Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction," *University of Pennsylvania Law Review* 125, no. 6 (1977): 1187 (suggesting that the outcomes of cases depend on two factors: "the limitations of the verbal formulas of antitrust rules", and the assumptions of the decision-maker about the various antitrust goals).

4 This presumptive rule on predatory pricing was established as "the AKZO formula" and was supplemented by "the Post Danmark test". This is described in Section 2.7 of Chapter 5 of this dissertation.

5 This presumptive rule on rebates with exclusive-trading conditions was originally established in *Hoffmann-La Roche* (at paragraph 89 of the ECJ judgment), and was upheld in a string of subsequent cases, including *Michelin I* (at paragraph 72 of the ECJ judgment), *Michelin II* (at paragraph 56 of the CFI judgment), *Post Danmark II* (at paragraph 27 of the ECJ judgment). This is described in Section 2.12 of Chapter 5 of this dissertation. See also, Xingyu Yan, "Whither Antitrust Regulation of Loyalty Rebates in China: The Tetra Pak Decision and Lessons from the EU," *World Competition* 40, no. 4 (December 1, 2017): 630, 633.

6 This "potential effect" threshold, which usually comes along with the "all circumstances" analytical framework, applies to refusal to supply, margin squeeze, tying, and loyalty rebates that do not have exclusive-trading conditions. This is described in Sections 2.9–2.12 of Chapter 5 of this dissertation.

7 This was the case for the *AKZO* formula, which uses "an intention to exclude" as a proxy for verifying the alleged anticompetitive effects. This is discussed in Section 2.7.1.2 of Chapter 5. See also, Anne C Witt, *The More Economic Approach to EU Antitrust Law*, Hart Studies in Competition Law, volume 14 (Oxford, United Kingdom: Hart Publishing, 2016), 289 (observing that when applying Art 102, the CJEU "submits a number of practices to intermediary types of test that do not automatically infer their effects from their objective, but do not require an in-depth assessment of their likely effects either").

core mandate,[8] and the observation that the CJEU carries a strong and politically entrusted mandate—market integration. In other words, when coupled with the "market integration" mandate, the CJEU's rather strict adherence to the legal text increases the possibility of making false positive errors in its theory-of-harm production.[9]

Admittedly, such errors are not to say that the CJEU has done wrong for upholding political and social objectives that are more value-loaded, on top of the economic ones that are deemed to be value-free or less value-loaded.[10] The problem is that *unsubstantiated* concerns for such political and social objectives in individual cases negatively affect the quality of the theories of harm therein, which in turn undermine the efforts to uphold such objectives. It is impossible to ascertain exactly how many false positive errors have been committed, since there is no further way to challenge (and thus to invalidate) a final judgment by the CJEU.[11] Nonetheless, one could suspect that such errors existed in the commonly vague theories of harm of the ECJ cases in the 1970s.

The CJEU's change of attitude somewhere in the 1980s also indicated that there had been such errors: As the integration mandate was achieved to a great extent (especially in the aspect of negative integrations), "market integration" was becoming less dominant in the CJEU's theory-of-harm production in the 1980s and 1990s than it was in the 1970s.[12] This enabled the CJEU to become more receptive to economic thinking, as evidenced by the increasingly elaborate theories of harm from the 1980s onwards. Another possible enabler of this receptive attitude was that, by then, the CJEU might have become quite aware of the false positive risk. However, even with such valid reasons to be receptive, the CJEU needed and still needs to weigh the benefits of including more economic considerations in antitrust adjudication against the increased costs thereof.[13] Therefore looking ahead, the extent of the CJEU's embrace of economics in the theory-of-harm production is likely to be limited.

8 Frank H. Easterbrook, "Does Antitrust Have a Comparative Advantage?," *Harvard Journal of Law & Public Policy* 23, no. 1 (1999): 8–9 ("People are quick to condemn what they do not understand." However, in light of the possibility that judges could alternatively be open-minded and tolerant towards what they do not understand, the "quick condemnation" attitude in this quote would make sense only when taking into account the judges' uniform incentive to safeguard the core mandates of the judiciary.).

9 Witt, *The More Economic Approach to EU Antitrust Law*, 254–56, 260 (observing how the integration mandate could discount the supposed benefits of a more economic approach, such as more accurate assessment results and a relief of the caseload).

10 Flynn, "Antitrust Jurisprudence," 1186 (contrasting two strands of antitrust goals: the political and social ones versus the economic ones that are deemed to be more value-free).

11 Easterbrook, "Does Antitrust Have a Comparative Advantage?," 9 ("Once the court speaks, the contract is gone. If the prohibition was mistaken, we shall suffer the consequences indefinitely." This is because mistakes "of law are not subject to competitive pressures".).

12 Witt, *The More Economic Approach to EU Antitrust Law*, 10 ("While the aim of protecting the single market, renamed 'internal market' by the Treaty of Lisbon, remains a valid and important objective of the Union, it lost some of its immediate urgency after 1 January 1993.").

13 Thomas A. Lambert and Alden F. Abbott, "Recognizing the Limits of Antitrust: The Roberts Court versus the Enforcement Agencies," *Journal of Competition Law & Economics* 11, no. 4 (2015): 796–98 (describing the various types of antitrust enforcement costs).

3.1.2 The Agency's Use of Economics as a Counter-Constraining Mechanism

In a supervisory "court-agency" paradigm, a public enforcement agency exerts its discretionary power under the constraint of the judiciary. Under the "principal-agent" lens,[14] this means that the judiciary functions as a third-party control mechanism on behalf of the legislators (the principal) to make sure that the enforcement agency (the agent) fulfills its delegated responsibilities.

Against this backdrop, the risk of making Type I (as well as Type II—false negative) errors turns into the only vantage point for the agency to *leverage* for itself more discretionary power in enforcement. Such "leveraging" dynamics could be identified in the instance of the EU: the Commission points out for the CJEU the constant risk of Type I errors when legal assessments contradict economics, thus persuading the CJEU to give it more discretion in enforcement decision-making. Not surprisingly, this set of dynamics is observable in the field of competition law, since the legal rationales in this field are highly dependent on the supplies of economic theories.[15] An exemplification of this set of dynamics is the established line that the Commission is to be respected in terms of "complex economic assessments".[16] Also, this set of dynamics puts into perspective the "more economic approach" advocated by the Commission.[17]

Therefore, one could say that the Commission has a *counter-constraining* mechanism on the CJEU: it uses its proactive role as the public enforcer to preemptively add more economic "inputs" in the theory-of-harm production. This preemptive move makes the CJEU more likely to defer to the Commission's contributions to the substantive law development. The effectiveness of this counter-constraining mechanism could be observed in the CJEU's preliminary ruling cases. These cases show an increasing trend of the CJEU adopting, on its own initiative, certain economic rationales that were originally brought forward by the Commission. For example, in *TeliaSonera* and *Post Danmark I*, the CJEU employed the as-efficient-competitor rationale,[18] which was introduced by the Commission in its Guidance Paper in 2009.[19]

14 The "principal-agent" relationship is discussed in Section 1 of Chapter 1 and Section 4.3 of Chapter 4 of this dissertation (in the context of the AML).

15 This point is exemplified in the discussion on the economic theoretical foundations of Art 102 TFEU in Section 1.3 of Chapter 2 of this dissertation.

16 Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II 3601, paras 87, 379. However, it should be noted that this line is not static, in the sense that the CJEU can push it by narrowing the interpretation of "complex economic assessments" and thus becomes less deferential. The most recent cases delivered by the CJEU seem to reflect this point.

17 Witt, *The More Economic Approach to EU Antitrust Law*, 74 (suggesting that the Commission's ambition behind advocating a more economic approach is to change the substantive law, instead of "a mere tweak in methodology").

18 This is discussed in Section 3.1.2 of Chapter 5 of this dissertation.

19 The European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, [February 24, 2009] OJ C45/7, paras 23, 27. See also, Giorgio Monti, "Article 82 EC: What Future for the Effects-Based Approach?," *Journal of European Competition Law & Practice* 1, no. 1 (2010): 3–4.

Of course, while benefiting from advocating a more economic approach to producing theories of harm, the Commission also needs to take into account the ensued costs. For example, while reducing Type I and Type II errors, the increased use of economics could also induce expert-bias errors.[20] Plus, the Commission has to consider the ensued administrative costs of following a more economic approach, as well as the potential backlash from the CJEU for undermining legal certainty.[21] Therefore, the Commission needs to test and adjust continuously so as to optimize its situation.[22]

3.2 The Theory of Harm Production in a Competitive "Agency-Court" Paradigm: The Chinese Regime

3.2.1 Performance Review as the Key

There is a premise for discussing the competitive "agency-court" paradigm: the "principal-agent" relationship conception. Under that premise, both the agencies and the courts are understood as "agents" entrusted by the "principal" to achieve the desired outcomes of a law.[23] In that sense, the "dual-track with virtually no judicial supervision" structure of the AML could be understood as the principal's institutional choice for achieving the desired outcomes of the AML application.

As discussed in Section 2.4.1.2 of Chapter 2, in the context of antitrust technocracy, the most relevant question is not how much deference should be given, but whether such technocratic expertise has been translated into better agency performance. In other words, the absence of judicial supervision does not necessarily render a competition law regime unworkable, as long as agency technocracy has been verifiably transforming into better agency performance.

Therefore, in a competitive "agency-court" paradigm where the judiciary no longer performs the supervisory role and instead functions as a parallel-track enforcer, the key issue is assessing the performances of the agencies and the courts. One assessable aspect is their production of theories of harm. This is done in Chapter 6. The purpose is to examine two issues:

20 Jeffrey J. Rachlinski and Cynthia R. Farina, "Cognitive Psychology and Optimal Government Design," *Cornell Law Review* 87, no. 2 (2002): 560.

21 These costs are discussed in Section 1.3.5 of Chapter 2 of this dissertation. See also, Witt, *The More Economic Approach to EU Antitrust Law*, 289–90, 301.

22 Rachlinski and Farina, "Cognitive Psychology and Optimal Government Design," 561 ("Of particular interest to regulatory policymaking, organizations can be structured to optimize the benefits and costs of expert decisionmaking.").

23 See note 14 above. See also, Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," 59; Suli Zhu, "The Party and the Courts," in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (Cambridge: Cambridge University Press, 2009), 56–57 (discussing how, under a party-state ruling, the Chinese courts serve as subordinates of the Chinese Communist Party to carry out judicial functions that are to a certain extent similar to those of a democratic society).

(1) Whether the structurally induced *competitive* dynamics have stimulated better performances of the agencies and the courts, and
(2) Whether certain mechanisms have been functioning as a replacement of the supervisory judiciary.

3.2.2 The Courts Showing Poorer Performances

Based on the enforcement records of the past decade, Chapter 6 finds that the courts have largely failed to be a good "agent" to its "principal". More specifically, the courts have shown poorer performances compared with the agencies, in the sense that they have produced problematic theories of harm at a higher rate and to a more serious extent. Accordingly, one could say that the courts have become a major source of legal uncertainty, for producing inconsistent and distortive theories of harm so commonly. This is in stark contrast with the supervisory paradigm of the EU, where the CJEU has been dutifully adhering to the Treaty provisions and the case law, even to the extent of appearing too conservative sometimes.

This problem could be attributed to the dual-track institutional setting, which relieved the courts' supervisory responsibilities and enabled them to compete with the agencies in terms of the theory-of-harm production. This attribution can be explained from the following two aspects. First, being kept away from supervising the agencies, the courts lose the most important channel to advance their competition law expertise. Secondly, being the "competitor" of the enforcement agencies, the courts are driven by the common ambition of expanding the judicial power in the AML enterprise. When coupled with inadequate expertise, this activist tendency generates questionable law-application outcomes.

3.2.3 The Agencies' Deeper Problem

In comparison with the courts, the agencies (especially the SAIC and its local offices) produce higher-quality theories of harm. Namely, their allegations of harm and elaborations of theories demonstrate more logical coherence and greater alignment with economic theory than those of the courts. This is shown in Chapter 6. However, one should probably not be too optimistic about the agencies' superiority as the "agent" of the "principal", for the following reasons.

First, the agencies' performance is just slightly better. The theories of harm produced by them are not without problems. In that regard, one also has to take into account the fact that the sampling pool of the agencies is much larger than that of the courts, as the agencies operate on a proactive and more frequent basis.

Secondly, the theory-of-harm production is only "the tip of the iceberg" of the enforcers' overall performance. Namely, when taking into account the cases and investigations that did not reach the decision stage and the other aspects of the decided cases (such as their

sanction levels), one could identify a deeper issue: *inadequate enforcement*. This issue could be attributed to two factors.

- The first factor is the capacity constraints. The agencies have constantly suffered from the shortage of manpower.[24] Hopefully the situation would improve as the SAMR has consolidated the enforcement powers, but the capacity constraints are likely to persist for a long time to come.
- The second and more fundamental factor is the dual-track institutional setting: as the agencies become subject to administrative superior control instead of judicial supervision, they become more susceptible to policy influences that are not legally vetted. In that regard, the absence of judicial supervision represents the loss of institutional guarantee for independence. Had there been any judicial supervision, the agencies as more independent AML enforcers would probably have a better chance in curing under-enforcement. This is an interesting contrast with the EU regime, where the Commission is in a way "battling for more discretion" with the CJEU and the concern is more about over-enforcement instead of under-enforcement. On the basis of that comparison, one could say that administrative superior control is an inferior substitute for judicial supervision for the "ruler" that wants to rein the administrative agencies as its "agents" in a young competition law regime.

In light of this inferiority, the fact that the agencies produce higher-quality theories of harm is of limited value for the regime as whole. This is based on two aspects of consideration. First, the relatively better agency performance comes at the expense of inadequate enforcement. In other words, it can be doubted whether the recorded enforcement outcomes would be the best that the agencies could do, had they been exposed to more third-party supervision. Secondly, the production of higher-quality theories of harm may not be sustainable, on account of the agencies' susceptibility to unchecked policy influences. The institutional safeguards to prevent that from happening are severely limited.

4 Summary Answers to the Research Questions

As regards to the research questions posed in Section 2 of Chapter 1, this dissertation draws the following conclusions:

A theory of harm can be described as a narrative that demonstrates the anticompetitiveness or the competitive harm of a practice in question in the context of competition law. There are two essential components of a theory of harm: economic theories and the policy mandates of a particular legal regime. Under that premise, the quality of a theory of harm

24 Xingyu Yan, "The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime: The Inevitable Overstepping of Authority and the Implications," *Journal of Antitrust Enforcement* 6, no. 1 (2018): 128, https://doi.org/10.1093/jaenfo/jnx018 (describing the manpower shortage of the SAIC and the NDRC).

can be appraised with two basic criteria: internal consistency of logic and the degree to which it makes general economic sense.

After categorizing the institutions in a regime of law on abuse of dominance as administrative agencies and courts and by using the EU regime and the Chinese regime as research samples, this dissertation observes that different institutions produce theories of harm differently. There are two levels of differences: Within a regime, the agencies appear to be better at alleging the types of harm at stake while the courts seem better at elaborating the theories. Across the regimes (of the EU and China), there are more nuanced differences, which could be characterized as two scenarios of "agency-court" dynamics: the supervisory scenario (the EU regime) and the competitive scenario (the Chinese regime).

In the first scenario, the agency (the Commission) increases the use of economics in the theory-of-harm production, in an effort to alleviate the extent of judicial constraints. The court (the CJEU) is less interested in the use of economics, mainly because of its institutional superiority and its responsibility to uphold the integration mandate. Nonetheless, the agency and the court have a common pursuit when producing theories of harm: reducing false positive and false negative outcomes, despite the different lengths to which they go for that pursuit.

The second scenario shows more problems. There, the agencies struggle to overcome the persistent problem of inadequate enforcement. Meanwhile, the courts continuously produce distortive theories of harm. Two factors jointly induce the production of such distortive outcomes: (1) the courts' ambitions to expand the judicial power (within the AML enterprise) in private enforcement cases where they are freer to do so, and (2) their lack of AML expertise.

The abovementioned findings have a crucial implication: the presence of judicial supervision, or the lack thereof, determines the type of institutional dynamics that underpin the production of theories of harm in a regime, and therefore it has a definitive impact on the quality of the theories of harm produced. This can be explained under the "principal-agent" relationship conception: Judicial supervision can be perceived functionally as a third-party control mechanism. In that event, it serves as an institutional guarantee that high-quality theories of harm will be produced consistently. The lack of third-party control brings more problems than benefits; it does not matter if the "agent" is an administrative agency or a court.

In that light, this dissertation advises the AML legislators and policymakers to rethink the institutional structure, particularly the virtual absence of judicial supervision on public enforcement. The consolidation of the tripartite agencies was a plausible step taken in that regard. For a next step, this dissertation advises the installation of certain third-party control

mechanisms that are acceptable within the Chinese political and legal system. For example, an internal review mechanism could be established within the Anti-Monopoly Bureau of the SAMR, like the one that exists in most (if not all) European competition authorities. Also, this dissertation urges the AML public enforcers to improve its procedural transparency and information disclosure. This would invite closer monitoring by peers in the antitrust community and the general public, and thus would compensate, to a certain extent, the lack of third-party control.

5 A Remark on Further Research

Based on the conclusions, this dissertation identifies two areas where further studies would be appreciated.

The first area is the study of the EU case law. Over the years, the Commission and the CJEU together have produced many landmark cases, including but not limited to the ones analyzed in this dissertation. When the theories of harm of these cases were being produced, legal concepts and standards were formulated; analytical frameworks were established and reinforced. In that light, it is important to examine (1) whether and to what extent those legal concepts, legal standards, and analytical frameworks are compatible with each other, and (2) whether and to what extent they are able to accommodate "the more economic approach" and to meet the new theoretical and practical challenges posed by economic reality. There have been many studies in these regards. By systematically describing the theories of harm in those landmark cases, this dissertation provides a basis for further research in those regards.

The second area is the study of the Chinese AML regime. The enforcement records presented in this dissertation are only "the tip of the iceberg". There are many other aspects of the regime that call for problem-based research. Such research may go beyond the scope of law. For example, there is the observable problem of the AML's under-enforcement against Chinese Internet giants. To study this problem, a legal doctrinal approach would not suffice; empirical analyses and political perspectives would probably be necessary. This dissertation is a starting point for such problem-based research.

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List of Tables

List of Abbreviations

AEC	As-Efficient-Competitor
AG	Advocate General
AIC	(provincial) Administration for Industry and Commerce
AIC	Average Incremental Cost
AMC	Anti-Monopoly Commission
AML	Anti-Monopoly Law
ATC	Average Total Cost
AVC	Average Variable Cost
BERs	Block Exemption Regulations
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
DG	Directorate General
DOJ	Department of Justice
DRC	(provincial) Development and Reform Commission
EAEC	European Atomic Energy Community
EC	European Community
ECJ	(European) Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
FTC	Federal Trade Commission
GC	General Court
IM	Instant Messaging
IO	Industrial Organization
IPRs	Intellectual Property Rights
M&A	Merger & Acquisition
MOFCOM	Ministry of Commerce
MS	Member State
NCAs	National Competition Authorities
NDRC	National Development and Reform Commission
R&D	Research & Development
RPM	Resale Price Maintenance
S-C-P	Structure-Conduct-Performance
SAIC	State Administration for Industry and Commerce
SAMR	State Administration for Market Regulation
SEP	Standard Essential Patent
SPCs	Supplementary Protection Certificates
SSNDQ	Small but Significant Non-transitory Decrease in Quality
SSNIP	Small but Significant Non-transitory Increase in Price
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
US	United States

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Samenvatting

Het doel van dit onderzoek is het analyseren hoe, in een mededingingsrechtelijk regime, de institutionele dynamiek tussen rechtbanken en de handhavingsinstanties van invloed kan zijn op de uitkomsten van de rechtshandhaving. Dit onderzoek vindt plaats door een rechtsvergelijkende EU-China-analyse uit te voeren. De centrale onderzoeksvragen zijn als volgt:

- Worden verschillende schadetheorieën geproduceerd door de functioneel verschillende instellingen binnen een rechtsstelsel met betrekking tot misbruik van machtspositie?
- Zo ja, in hoeverre verschillen ze?

De volgende deelvragen kunnen worden ontwikkeld:

- - Wat zijn de institutionele structuren (en de daaruit voortvloeiende dynamiek) van de EU en Chinese regelgeving over misbruik van machtspositie? Hoe verschillen ze van elkaar?
- Welke schadetheorieën kunnen worden geïdentificeerd en gecategoriseerd op basis van de handhavingsgegevens van de EU en Chinese regimes?
- In elk van deze twee regimes, of er verschillen zijn tussen de schadetheorieën geproduceerd door de autoriteiten en die door de rechtbanken?
- Als het antwoord op de vorige vraag ja was, hoe kon dan de structureel geïnduceerde institutionele dynamiek dergelijke verschillen verklaren? Wat zijn de implicaties van dergelijke accounts?

Dit proefschrift is gebaseerd op drie onderzoeksmethodologieën. De eerste is de zogenaamde doctrinaire benadering, aangezien dit proefschrift zich richt op het analyseren van de inhoud van jurisprudentie. In dergelijke analyses wordt de interne logica van jurisprudentie van de twee rechtssystemen bestudeerd om zoedoende de vervaardiging van de schadetheoriën kritische te kunnen beschrijven. Daarnaast kent dit onderzoek ook verscheidene niet doctrinaire aspecten, waar de methodologie van het literatuuronderzoek wordt toegepast. Ten derde wordt er in dit proefschrift de methodologie van de functionele vergelijking toegepast.

Het proefschrift bestaat uit zeven hoofdstukken. Hoofdstuk 1 vormt de inleiding. Hoofdstuk 2 weergeeft het theoretisch kader. Als eerst wordt het concept van de schadetheorie besproken met betrekking tot haar narratieve functie en enkele belangrijke kenmerken hiervan. Het bespreekt ook in een theoretische context de institutionele structuur en dynamiek die ten grondslag ligt aan de rechtshandhaving bij misbruik van een machtspositie. Hoofdstuk 3 introduceert eerst het EU-rechtskader inzake misbruik van een machtspositie en vervolgens de institutionele structuur van het EU-regime op supranationaal niveau. Evenzo gestructureerd introduceert hoofdstuk 4 het juridische kader en de institutionele structuur van de Chinese AML. Het benadrukt de rol die de drie handhavingsinstanties

hebben gespeeld in het AML-wetgevingsproces en de afbakening van de rechtsmacht nadat de AML is goedgekeurd; het doel is om uit te leggen hoe de idiosyncratische institutionele structuur tot stand kwam. Hoofdstuk 5 behandelt de productie van theorieën over schade in het EU-regime. Het beschrijft eerst het mandaat voor marktintegratie. Vervolgens selecteert het een aantal gevallen en analyseert de theorieën over schade die is veroorzaakt door de institutionele actoren die bij deze zaken zijn betrokken. Samenvattende observaties worden gepresenteerd na de analyses. Hoofdstuk 6 draait om de productie van theorieën over schade door de AML-handhavers. Het selecteert een aantal zaken over misbruik van een machtspositie (en bovendien over prijsbinding van wederverkoop) door de handhavingsinstanties en de rechtbanken. De theorieën van schade in deze gevallen worden dienovereenkomstig geanalyseerd. Samenvattende observaties worden gepresenteerd na de analyses. Hoofdstuk 7 trekt de conclusies.

Dit proefschrift bestaat uit zeven hoofdstukken. Hoofdstuk vormt de inleiding. In hoofdstuk twee wordt het theoretisch kader totstand gebarcht. In dit hoofdstuk wordt eerst het concept van de schadehteorie besproken, met betrekking tot haar narratieve functie en een aantal kern karakteristieken. Ook worden er in de theoretische context institutionele structuren en dynamieken onderliggend aan de rechtshandhaving van misbruik van een machtspositie besproken. Hoofdstuk drie introduceert als eerst het Europese wettelijke kader met betrekking tot misbruik van een machtspositie en vervolgens de Europese institutionele structuur op het supranationale niveau. Hoofdstuk vier, dat hetzelfde gestructureerd is, weergeeft het wettelijke regime en de institutionele structuur van de Chinese AML. Daarbij wordt nadruk gelegd op de verschillende rollen van de handhavende instanties in het AML wetgevingsrpoces en de afbakening van de jurisdicties kort nadat het AML was aangenomen. Het doel hierbij is het beschrijven van hoe de idiosyncratische institutionele structuur totstand kwam. Hoofdstuk vijf richt zich op de schadetheoriën in het Europese regime. Als eerst wordt de markt integratie mandaat beschreven. Vervolgens worden er een aantal zaken geselecteerd en de schadetheoriëen geproduceerd door de institutionele actoren in deze zaken geanalyseerd. Samenvattende observaties worden gepresenteerd na deze analyses. Hoofdstuk zes richt zich op de fabricage van schadetheorieen door de AML handhavendende instanties. Ook hier worden een aantal zaken over misbruik van machtspositie geselecteerd (en daarnaast over resale price maintenance) door de handhavende instanties en de gerechten. De schadetheorieen in deze zaken worden overeenkomstig geanalyseerd. Ook worden er samenvattende observaties weergeven na deze analyses. In hoofdstuk zeven worden conclusies getrokken.

Dit proefschrift stelt vast dat een theorie van schade kan worden omschreven als een verhaal dat de mededingingsbeperkende of concurrentiële schade van een praktijk in kwestie in de context van het mededingingsrecht aantoont. Er zijn twee essentiële componenten van een theorie van schade: economische theorieën en de beleidsmandaten van een bepaald wettelijk regime. In dit uitgangspunt kan de kwaliteit van een theorie van schade

beoordeeld worden aan de hand van twee basiscriteria: interne consistentie van logica en de mate waarin het algemeen economisch verantwoord is.

Nadat de instellingen in een rechtsstelsel over misbruik van machtspositie als bestuurlijke instanties en rechtbanken zijn geclassificeerd en het EU-regime en het Chinese regime als onderzoeksmonsters zijn gebruikt, wordt in dit proefschrift opgemerkt dat verschillende instellingen andersoortige theorieën over schadeclaims presenteren. Er zijn twee niveaus van verschillen: binnen een regime lijken de autoriteiten beter te kunnen beweren welke soorten schade op het spel staan, terwijl de rechtbanken beter lijken in het uitwerken van de theorieën. Over de regimes (van de EU en China) heen zijn er meer genuanceerde verschillen, die kunnen worden gekarakteriseerd als twee scenario's van de "agency-court" -dynamiek: het toezichtscenario (de EU-regeling) en het concurrerende scenario (het Chinese regime).

In het eerste scenario verhoogt het bureau (de Commissie) het gebruik van de economie in de theorie van schadeproductie, in een poging om de omvang van de juridische beperkingen te verlichten. De rechtbank (het HvJEU) is minder geïnteresseerd in het gebruik van de economie, vooral vanwege haar institutionele superioriteit en haar verantwoordelijkheid om het integratiemandaat te handhaven. Desalniettemin hebben het bureau en de rechtbank een gemeenschappelijk streven naar het ontwikkelen van theorieën over schade: het verminderen van fout-positieve en fout-negatieve uitkomsten, ondanks de verschillende lengtes waarnaar ze streven voor dat streven.

Het tweede scenario toont meer problemen. Daar worstelen de agentschappen om het hardnekkige probleem van ontoereikende handhaving te overwinnen. Ondertussen produceren de rechtbanken voortdurend verstorende theorieën over schade. Twee factoren veroorzaken gezamenlijk de productie van dergelijke verstorende resultaten: (1) de ambities van de rechtbanken om de rechterlijke macht uit te breiden (binnen de AML-onderneming) in particuliere handhavingszaken waar ze vrij zijn om dat te doen, en (2) hun gebrek aan AML-expertise .

De bovengenoemde bevindingen hebben een cruciale implicatie: de aanwezigheid van gerechtelijk toezicht, of het gebrek daaraan, bepaalt het type institutionele dynamiek dat de productie van theorieën van schade in een regime ondersteunt, en heeft daarom een definitief effect op de kwaliteit van de theorieën van geproduceerde schade. Dit kan verklaard worden onder de "principaal-agent" -relatie: justitieel toezicht kan functioneel gezien worden als een controlemechanisme van een derde partij. In dat geval dient het als een institutionele garantie voor het consistent produceren van hoogwaardige theorieën over schade. Het gebrek aan controle door derden levert meer problemen op dan voordelen; het maakt niet uit of de "agent" een administratief bureau of een rechtbank is.

In dat licht adviseert dit proefschrift de wetgevers en beleidsmakers van de AML om de institutionele structuur te heroverwegen, met name de virtuele afwezigheid van gerechtelijk toezicht op openbare handhaving. Dit proefschrift adviseert de installatie van bepaalde controlemechanismen van derden die aanvaardbaar zijn binnen het Chinese politieke en juridische systeem. Er zou bijvoorbeeld een intern beoordelingsmechanisme kunnen worden ingesteld binnen het Anti-Monopoly Bureau van de SAMR, zoals het mechanisme dat bestaat in de meeste (zo niet alle) Europese mededingingsautoriteiten. Dit proefschrift dringt er ook bij de AML-handhavingsambtenaren op aan de procedurele transparantie en de openbaarmaking van informatie te verbeteren. Dit zou een nauwlettender toezicht door peers in de antitrustgemeenschap en het grote publiek tot gevolg hebben en zou zo tot op zekere hoogte het gebrek aan controle van derden compenseren.

Curriculum vitae

Xingyu Yan was born in 1989 in Yunnan, China. He graduated with a bachelor degree in Political Science from the China Youth University for Political Studies in 2011. He continued his study at the China-EU School of Law at the China University of Political Science and Law and graduated with two master degrees in 2014: one J.M. in Economic Law awarded by the China University of Political Science and Law, and one LL.M. in European and International Law awarded by the University of Hamburg. During the three years of study, he developed a research interest in competition law. With the funding of the China Scholarship Council, he went on to pursue a Ph.D. at the University of Groningen since September 2014.

He passed the National Judicial Examination of the People's Republic of China in 2012 and was subsequently granted a Legal Professional Qualification Certificate for legal practice in China.